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**SUPREME COURT, U.S.**

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**Supreme Court of the United States**

**OCTOBER TERM, 1951**

**No. 9**

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**DONALD R. DOREMUS AND ANNA E. KLEIN,**  
**APPELLANTS,**

*vs.*

**BOARD OF EDUCATION OF THE BOROUGH OF**  
**HAWTHORNE AND THE STATE OF NEW**  
**JERSEY**

---

**APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY**

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**FILED FEBRUARY 16, 1951.**





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BOARD OF EDUCATION OF THE BOROUGH OF  
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JERSEY

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 18, 1951.

[fol. 1]

**IN SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, PASSAIC COUNTY**

Civil Action Docket No. 5201-48

**DONALD R. DOREMUS and ANNA E. KLEIN, Plaintiffs,**

**vs.**

**BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, NEW JERSEY, AND THE STATE OF NEW JERSEY, Defendants**

**COMPLAINT—Filed April 21, 1949**

Plaintiffs Donald R. Doremus residing in the Township of Rutherford, County of Bergen and State of New Jersey, and Anna E. Klein residing in the Borough of Hawthorne, County of Passaic and State of New Jersey, say that:

1. The interest of plaintiff Donald R. Doremus, in this case, is as a citizen and taxpayer of the State of New Jersey directly, and as a taxpayer in the Township of Rutherford and the State of New Jersey.

2. The interest of Anna E. Klein in this suit is that of a citizen and taxpayer of the Borough of Hawthorne and State of New Jersey and as the mother and person standing in loco parentis of her daughter Gloria Klein, age 17, who is a student in the Hawthorne High School.

[fol. 2] 3. The said Hawthorne High School is operated by the defendant, the Board of Education of Hawthorne, and is supported by public funds by the Borough of Hawthorne and by public funds appropriated by the State of New Jersey for the support of public schools.

4. The said Board of Education of Hawthorne by its agents, servants, and teachers in the said Hawthorne High School and other public schools of said Borough, is engaged in the practice of reading excerpts from that portion of the Holy Bible known as the Old Testament daily in the classrooms and assembly halls of said schools. This practice engaged in by the said Board of Education and persons employed by it, purports to be and is pursuant to a certain

statute or law of the state of New Jersey known as Revised Statutes 18:14-77, which law or statute provides as follows:

18:14-77. Reading Bible at opening of school

"At least five verses taken from that portion of the Holy Bible known as the Old Testament shall be read, or caused to be read, without comment, in each public school classroom, in the presence of the pupils therein assembled, by the teacher in charge, at the opening of school upon every school day, unless there is a general assemblage of the classes at the opening of the school on any school day, in which event the reading shall be done, or caused to be done, by the principal or teacher in charge of the assemblage and in the presence of the classes so assembled."

[fol. 3] 5. Plaintiffs charge that the aforesaid practice of reading certain verses daily from the said portion of Holy Bible known as the Old Testament, and the aforesaid state law upon which the practice is based and predicated, are contrary to the Constitution of the United States of America, specifically Amendment I and Amendment XIV, in that they constitute religious education and services in aid of one or more religions and in preference of one or more religions over others, and in that public funds and taxes are authorized to support religious activities and institutions and for the purpose of teaching and practicing religion, contrary to the Constitution and laws of the United States of America.

Wherefore, Plaintiff prays:

(a) That this court may construe the rights, statutes and other legal relations of the parties hereto with reference to the said practice and the aforesaid state law;

(b) That this court determine the validity, legality and constitutionality of the aforesaid state statute; that it determine and declare by its judgment that the said statute, to wit; Revised Statutes 18:14-77 is invalid, illegal, unconstitutional and contrary to the Constitution of the United States of America, and that the practice set forth above is invalid, illegal, and contrary to the laws and the Constitution of the United States of America;

(c) That the State of New Jersey and all its agencies be enjoined and restrained from compelling observance of the



said state statute and that it use its proper agencies to forbid and prohibit any others from observing and complying with said statute; and

[fol. 4] (d) That the aforesaid Board of Education in the Borough of Hawthorne and all persons in its employ be enjoined and restrained from observing and complying with the aforesaid statute and from reading or causing to be read in the public schools of said Borough any excerpts from the aforesaid portion of the Holy Bible known as the Old Testament or from any other religious book or tract.

(S.) Heyman Zimel, Attorney for Plaintiffs.

[fol. 5] IN SUPERIOR COURT OF NEW JERSEY, PASSAIC COUNTY  
LAW DIVISION

[Title omitted]

ANSWER OF DEFENDANT BOARD OF EDUCATION—Filed May 10,  
1949

The Defendant Board of Education of the Borough of Hawthorne, New Jersey, having its office in the Municipal Building, Lafayette Avenue, Hawthorne, Passaic County, New Jersey, answering the Complaint of the Plaintiffs, Donald R. Doremus and Anna E. Klein, says:

1. It has no knowledge or information sufficient to form a belief as to the allegations of paragraphs 1 and 2 of the Complaint.
2. It admits the allegations of paragraphs 3 and 4 of the Complaint.
3. It denies the allegations of paragraph 5 of the Complaint.

Alexander E. Fasoli, Attorney for Defendant, Board  
of Education of the Borough of Hawthorne, N. J.



4  
[fol. 6] IN SUPERIOR COURT OF NEW JERSEY, LAW DIVISION—  
PASSAIC COUNTY

[Title omitted]

ANSWER OF DEFENDANT STATE OF NEW JERSEY—Filed May  
16, 1949

The Defendant, the State of New Jersey, by way of answer to the complaint filed herein says that

1. It has no knowledge or information concerning the status of the Plaintiff, Donald R. Doremus, and leaves him to his proof.

2. The Defendant, the State of New Jersey, has no knowledge or information concerning the status of Anna E. Klein, as a citizen and taxpayer, or as a mother and person standing in loco parentis of her daughter Gloria Klein, and leaves her to her proof.

3. The Defendant, the State of New Jersey, admits the allegations of Paragraph 3.

4. The Defendant, the State of New Jersey, admits the [fol. 7.] allegations of Paragraph 4.

5. The Defendant, the State of New Jersey, denies the allegations of Paragraph 5.

First Separate and Affirmative Defense

The Defendant, the State of New Jersey, reserves the right at or before the trial of this cause to move to dismiss the complaint filed herein upon the ground that it states no legal cause of action.

Second Separate and Affirmative Defense

The Plaintiffs have no standing in Court to pursue the cause of action filed by them.

Third Separate and Affirmative Defense

The Plaintiffs are barred of the remedy in the cause of action by reason of the long standing practice and by the laches of the Plaintiffs in acting thereon.

Fourth Separate and Affirmative Defense

The Plaintiffs have improperly instituted said action in the Law Division of the Superior Court, whereas the relief sought in said action is equitable in nature.

### Fifth Separate and Affirmative Defense

The Plaintiffs, in seeking the aid of equity, do not come into Court with clean hands, but for the purpose of dis-  
[fol. 8] crediting the government of the United States and of this State.

Theodore D. Parsons, Attorney General of the State of New Jersey.

[fol. 9] IN NEW JERSEY SUPERIOR COURT, PASSAIC COUNTY  
LAW DIVISION

[Title omitted]

PRETRIAL CONFERENCE ORDER—Filed November 17, 1949

Passaic County Courthouse, Paterson, N. J.

Thursday, November 10, 1949, 2 P. M.

#### Appearances:

For Plaintiffs, Heyman Zimel.

For Defendants, Theodore D. Parsons, Alexander E. Fasoli.

#### STATEMENT OF NATURE OF CAUSE

This is an action in lieu of prerogative writ brought to test the constitutionality of R. S. 18:14-77; and by stipulation of counsel the complaint is amended to include an attack upon the succeeding section R. S. 18:14-78; plaintiff charging that both sections are illegal and unconstitutional and seeking to preclude the Board of Education of the [fol. 10] Borough of Hawthorne and the State of New Jersey from operating thereunder.

Both parties move for summary judgment on the pleadings and waive notice and all formal requirements.

It is stipulated that the statute in question is in existence and that there is a compliance by the Board of Education of the Borough of Hawthorne.

Defendant Board of Education of the Borough of Hawthorne admits the statute and compliance, and it is stipulated that a directive issued by the Board provides that "any student may be excused during reading of the Bible upon request," and that in the present case neither parents nor child asked to be excused.

Defendant State of New Jersey admits the statute and compliance, waives its first separate defense by reason of the fact that it is merged in the motion for judgment, waives the second, fourth, and fifth defenses, and will press the third.

It is further stipulated by counsel that (1) the public schools of the Borough of Hawthorne and of the State of New Jersey are supported in part by public funds contributed by the State of New Jersey to school districts within the State of New Jersey for educational purposes, and in part by funds raised exclusively in the school district by levy of taxation of taxable property within the school district.

Set for trial, Monday, November 14, 1949.

Robert B. Davidson, A. J. S. C.

Heyman Zimel for plaintiffs.

Alexander E. Fasoli for defendant.

Theodore D. Parsons for defendant.

[fol. 11] IN SUPERIOR COURT OF NEW JERSEY, PASSAIC  
COUNTY LAW DIVISION

Docket No. 5201-48

DONALD R. DOREMUS and ANNA E. KLEIN, Plaintiffs,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, NEW  
JERSEY, and the STATE OF NEW JERSEY, Defendants

Civil Action

FINAL JUDGMENT—Filed March 13, 1950

This cause coming on to be heard in the presence of Heyman Zimel, Esquire, Attorney for Plaintiffs, Alexander E. Fasoli, Esquire, appearing for defendant Board of Education of The Borough of Hawthorne, New Jersey, Theodore D. Parsons, Esq., Attorney General of New Jersey and Henry F. Schenk, Deputy Attorney General of New Jersey, appearing for defendant State of New Jersey, upon Complaint and upon argument heard in open Court, and the



Court having heard and considered the argument of counsel, and it appearing that Plaintiffs seek to test the constitutionality of the provisions of the Laws of New Jersey, with respect to religious services or exercises in the public schools of the State of New Jersey, more particularly, the Constitutionality of Title 18, Chapter 14, Sections 77 and 78 of the New Jersey Revised Statutes; and it further appearing [fol. 12] ing that the facts are not in dispute, and it further appearing that the said matter is presented for determination upon cross-motions for summary judgment on the pleadings.

It is thereupon, on this 8th day of March, 1950, Ordered and Adjudged that Defendants' motion for summary judgment be and the same is hereby granted and plaintiffs' motion denied.

Robert H. Davidson, A., J. S. C.

[fol. 13] IN SUPERIOR COURT OF NEW JERSEY, PASSAIC COUNTY LAW DIVISION

DONALD R. DOREMUS and ANNA E. KLEIN, Plaintiffs,

VS.

BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, NEW JERSEY, and the STATE OF NEW JERSEY, Defendants

Civil Action

MEMORANDUM OF DECISION—Filed February 23, 1950

This action seeks to test the constitutionality of the provisions of the Laws of New Jersey with respect to religious services or exercises in the public schools of the state, and is presented for determination upon cross-motions for summary judgment on the pleadings. The statutes under attack are N.J. S. A. 18:14-77:

Reading Bible at opening of schools:

At least five verses taken from that portion of the Holy Bible known as the Old Testament shall be read, or caused to be read, without comment, in each public school classroom, in the presence of the pupils therein assembled by the teacher in charge, at the opening of school upon every school day, unless there is a general



assemblage of the classes at the opening of the school on any school day, in which event the reading shall be [fol. 14] done, or caused to be done, by the principal or teacher in charge of the assemblage and in the presence of the classes so assembled."

and *N. J. S. A. 18:14-78*:

"Religious services or exercises.

"No religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools."

Plaintiffs shortly contend that compliance with the statutes constitutes religious education and services in aid of one or more religions and in preference of one or more religions over others, and in that public funds and taxes are authorized to support religious activities and institutions and for the purpose of teaching and practicing religion, and so contravenes the First and Fourteenth Amendments to the Constitution of the United States, which read as follows:

#### "Article I

"Right of Conscience, Freedom of the Press, etc.

"Congress shall make no law respecting and establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

#### "Article XIV

"Citizens and Their Rights

#### "Section I

"All persons born or naturalized in the United [fol. 15] States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The facts are not in dispute. Plaintiff Doremus is a citizen and taxpayer of the Township of Rutherford, New Jersey, and plaintiff Klein is a citizen and taxpayer of the Borough of Hawthorne, New Jersey, and the mother of Gloria Klein, a student in the Hawthorne High School, which is a public school operated by the Board of Education and supported by public funds appropriated by the state and by said borough. Defendant Board of Education is complying with the laws and, although rules promulgated and directives issued by it permit any student to be excused from the classroom upon request when the Bible is read or the Lord's Prayer recited, no such request has ever been made by plaintiff Klein or her daughter. The matter, therefore, is submitted to the Court solely on the question of constitutionality, and appears to be of novel impression.

Although there is a diversity of opinion in the State courts as to statutes specifically permitting or requiring the Bible to be read in public schools, the great weight of authority generally seems to hold that such statutes do not contravene the provisions of the several State Constitutions.

That we are fundamentally a religious people is beyond [fol. 16] dispute. An excellent review of the American organic utterances which speak the voice of the entire people and which affirm and re-affirm that this is a religious nation, appears in *Church of the Holy Trinity v. United States*, 143 U.S. 457, wherein the Court said:

"But beyond all these matters no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation. The commission to Christopher Columbus, prior to his said westward, is from 'Ferdinand and Isabella, by the grace of God, King and Queen of Castile,' etc., and recites that 'it is hoped that by God's assistance some of the continents and islands in the ocean will be discovered,' etc. The first colonial grant, that made to Sir Walter Raleigh in 1584, was from 'Elizabeth, by the grace of God, of England, France and Ireland, queene, defender of the faith,' etc.; and the grant authorizing him to enact statutes for the government of the proposed colony provided that 'they be

not against the true Christian faith nowe professed in the Church of England.' The first charter of Virginia, granted by King James I in 1606, after reciting the application of certain parties for a charter, commenced the grant in these words: 'We, greatly commending, and graciously acceptation of, their Desires for the Furtherance of so noble a Work, which may, by the Providence of Almighty God, hereafter tend to the Glory of his Divine Majesty, in propagating of Christian Religion to such people, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God, and may in time bring the Infidels and Savages, living in those parts, to human Civility; and to a settled and quiet Government; DO, by these our Letter-Patents, graciously accept of, and agree to, their humble and well-intended Desires.'

Language of similar import may be found in the subsequent charters of that colony, from the same king, in 1609 and 1611; and the same is true of the various charters granted to the other colonies. In language more or less emphatic is the establishment of the Christian religion declared to be one of the purposes of the grant. The celebrated compact made by the Pilgrims in the Mayflower, 1620, recites: 'Having undertaken for the Glory of God, and Advancement of the Christian Faith; and the Honour of our King and Country, a Voyage to plant the first Colony in the northern Parts of Virginia; Do by the Presence of God and one another, covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation, and Furtherance of the Ends aforesaid.'

'The fundamental orders of Connecticut, under which a provisional government was instituted in 1638-1639, commence with this declaration: 'Forasmuch as it hath pleased the Almighty God by the wise disposition of his divyne providence so to Order and dispose of things that we the Inhabitants and Residents of Windsor, Hartford and Wethersfield are now cohabiting and [fol. 18] dwelling in and upon the River of Conecticotte and the Lands thereunto adjoyneing; and well knowing where a people are gathered together the word of God requires that to maintain the peace and union of such a people there should be and orderly



and decent Government established according to God, to order and dispose of the affayres of the people at all seasons as occasion shall require; doe therefore associate and conjoyne our selves to be as one Publike State or Commonwealth; and doe, for our selves and our Successors and such as shall be adjoynd to us att any tyme hereafter, enter into Combination and Confederation together, to mayntayne and presearve the liberty and purity of the gospell of our Lord Jesus weh we no prfesse, as also the disciplyne of the Churches, well according to the truth of the said gospell is now practised amongst us.'

'In the charter of privileges granted by William Penn to the province of Pennsylvania, in 1701, it is recited: 'Because no people can be truly happy, though under the greatest Enjoyment of Civil Liberties, if abridged of the Freedom of their Consciences, as to their Religious Profession and Worship; And Almighty God being the only Lord of Conscience, Father of Lights and Spirits; and the Author as well as Object of all divine knowledge, Faith and Worship, who only doth enlighten the Minds, and Persuade and convince the Understandings of People, I do hereby grant and declare,' etc,

'Coming nearer to the present time, the Declaration [fol. 19] of Independence recognizes the presence of the Divine in human affairs, in these words: 'We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, And the pursuit of Happiness.' 'We, therefore, the Representatives of the United States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name and by Authority of the good People of these Colonies, solemnly publish and declare,' etc.; 'And for the support of this Declaration, with a firm reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.'

'If we examine the constitutions of the various States we find in them a constant recognition of religious obli-



gations. Every constitution of every one of the forty-four States contains language which either directly or by clear implication recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well being of the community. This recognition may be in the preamble, such as is found in the constitution of Illinois, 1870: 'We, the people of the State of Illinois, grateful to Almighty God for the civil, political and religious Liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations,' etc.

[fol. 20] "It may be only in the familiar requisition that all officers shall take an oath closing with the declaration 'so help me God.' It may be in clauses like that of the constitution of Indiana, 1816, Article XI, section 4: 'The manner of administering an oath or affirmation shall be such as is most consistent with the conscience of the deponent, and shall be esteemed the most solemn appeal to God.' Or in provisions such as are found in Articles 36 and 37 of the Declaration of Rights of the Constitution of Maryland, 1867: 'That as it is the duty of every man to worship God in such manner as he thinks most acceptable to Him, all persons are equally entitled to protection in their religious liberty; wherefore, no person ought, by any law, to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice, unless, under the color of religion, he shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others in their natural, civil or religious rights; nor ought any person to be compelled to frequent or maintain or contribute, unless on contract, to maintain any place of worship, or any ministry; nor shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief: Provided, He believes in the existence of God, and that, under His dispensation, such person will be held morally accountable for his acts, and be rewarded or punished therefor, either in this world or the world to come. That no religious test ought ever to be required as a

[fol. 21] qualification for any office of profit or trust in this State other than a declaration of belief in the existence of God; nor shall the legislature prescribe any other oath of office than the oath prescribed by this constitution.' Or like that in Articles 2 and 3, of Part 1st, of the Constitution of Massachusetts, 1780: 'It is the right as well as the duty of all men in society publicly and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the Universe ... As the happiness of a people and the good order and preservation of civil government essentially depend upon piety, religion and morality, and as these cannot be generally diffused through a community but by the institution of the public worship of God and of public instructions in piety, religion and morality: Therefore, to promote their happiness and to secure the good order and preservation of their government, the people of this commonwealth have a right to invest their legislature with power to authorize and require, and the legislature shall, from time to time, authorize and require, the several towns, parishes, precincts and other bodies—politic or religious societies to make suitable provision, at their own expense, for the institution of public Protestant teachers of piety, religion and morality in all cases where such provision shall not be made voluntarily.' Or as in sections 5 and 14 of Article 7 of the constitution of Mississippi, 1832: 'No person who denies the being of a God, or a future state of rewards and punishments, shall hold any office in the civil department of this State ... Religion, morality [fol. 22] and knowledge being necessary to good government, the preservation of liberty, and the happiness of mankind, schools and the means of education, shall forever be encouraged in this State.' Or by Article 22 of the constitution of Delaware, 1776, which required all officers, besides an oath of allegiance, to make and subscribe the following declaration: 'I, A. B., do profess faith in God and Father, and in Jesus Christ, His only Son, and the Holy Ghost, one God, blessed for evermore; and I do acknowledge the Holy Scriptures of the Old and New Testament to be given by divine inspiration.'

"Even the Constitution of the United States, which is supposed to have little touch upon the private life of the individual, contains in the First Amendment a declaration common to the constitutions of all the States, as follows: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' etc. And also provides in Article 1, section 7, (a provision common to many constitutions,) that the Executive shall have ten days (Sundays excepted) within which to determine whether he will approve or veto a bill.

"There is no dissonance in this declaration. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons: they are organic utterances; they speak the voice of the entire people. While because of a general recognition of this truth the question has [fol. 23] seldom been presented to the courts, yet we find that in *Updegraph v. The Commonwealth*, 11 S. & R. 394, 400, it was decided that, 'Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania; . . . not Christianity with an established church, and tithes, and spiritual court; but Christianity with liberty of conscience to all men.' And in the *People v. Ruggles*, 8 Johns. 290, 294, 295, Chancellor Kent, the great commentator on American law, speaking as Chief Justice of the Supreme Court of New York, said: 'The people of this State in common with the people of this country, profess the general doctrines of Christianity, as the rule of their faith and practice; and to scandalize the author of these doctrines is not only, in a religious point of view, extremely impious, but, even in respect to the obligations due to society, is a gross violation of decency and good order . . . The free, equal and undisturbed enjoyment of religious opinion; whatever it may be, and free and decent discussions on any religious subject, is granted and secured but to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community, is an abuse of that right. Nor are we bound, by any expressions in the Constitution as some have strangely supposed,



either not to punish at all, or to punish indiscriminately the like attacks upon the religion of Mahomet or of the Grand Lama; and for this plain reason, that the case assumes that we are a Christian people, and [fol. 24] the morality of the country is deeply ingrafted upon Christianity, and not upon the doctrines or worship of those impostors.' And in the famous case of *Vidal v. Girard's Executors*, 2 How. 127, 198, this court, while sustaining the will of Mr. Girard, with its provision for the creation of a college into which no minister should be permitted to enter, observed: "It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania."

"If we pass beyond these matters to a view of American life as expressed by its laws, its business, its customs and its society, we find everywhere a clear recognition of the same truth. Among other matters note the following: The form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer; the prefatory words of all wills, 'In the name of God, amen;' the laws respecting the observance of the Sabbath, with the general cessation of all secular business, and the closing of the court, legislatures, and other similar public assemblies on that day; the churches and church organizations which abound in every city, town and hamlet; the multitude of charitable organizations existing everywhere under Christian auspices; the gigantic missionary associations, with general support, and aiming to establish Christian missions in every quarter of the globe. These, and many other matters which might be noticed, and a volume of unofficial declarations to the mass of organic utterances that this is a Christian [fol. 25] nation."

This review of the background and environment of the period in which the constitutional language was fashioned and adopted is necessary if we are to determine the spirit and intention of the Congress which submitted the constitutional amendments to the people, and the intention of the people themselves in adopting them. Clearly, there was never any intention to prohibit nonsectarian recogni-



tion of God by the State in public transactions and exercises, and New Jersey has recently reaffirmed that intention, for the Preamble to the State Constitution of 1947 was carried over verbatim from the Constitution of 1844 and reads as follows:

"We, the people of the State of New Jersey, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations, do ordain and establish this Constitution."

Mr. Justice Black, speaking for the Court in *Everson v. Board of Education*. (1947, 330 U. S. 1, 168 A. L. R. 1392, 91 L. Ed. 711, 67 S. Ct. 504), held that:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished [fol. 26] for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' *Reynolds v. United States*, *supra* (98 U. S. At 164, 52 L. Ed. 249)."

The First Amendment was intended to prohibit legislation for support of any religious tenets or the modes of worship of any sect, *Davis v. Beason* (1890), 133 U. S. 333, 342, 39 L. Ed. 637, 639, 10 S. Ct. 239, and as Justice Black himself, in the *Everson* case, *supra*, said:

"New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment con-

tribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church."

he doubtless construed "religion" as "sectarianism" or "religious tenets".

Evidence of this construction is further demonstrated by the fact that the states aid all religions by exempting church property from taxation and at the same time furnish state paid police and fire protection and all usual governmental services, while the national government has a chaplain [fol. 27] for each house of the Congress who daily invokes Divine blessing and guidance, and the armed forces have commissioned chaplains from early days. This, too, finds support in the *Everson* case, *supra*, for it holds that the purpose of the First Amendment "requires the State to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."

In *Lewis v. Board of Education of the City of New York* (1905), 285 N. Y. Supp. 164, the Court said that:

"Undisputed, the plaintiff's attack is on a belief and trust in God and in any system or policy of teaching which enhances or sustains or countenances or even recognizes that belief and trust. Such belief and trust, however, regardless of one's own belief, has received recognition in state and judicial documents from the earliest days of our Republic liberty for non-believers in God, by denial . . . to believers in a Deity, would be a mock liberty."

As there is no issue of prohibition upon the free exercise of religion, the crux of the sole question presented is whether the directed daily reading, without comment, in public school classrooms of five verses of the Old Testament of the Holy Bible, and the permissive repeating of the Lord's Prayer, in accordance with the New Jersey statutes, constitutes an "establishment of religion" as enjoined by the First Amendment. In other words, does it constitute denominational or sectarian instruction and thus support any religious tenets, or the mode of worship of any sect? [fol. 28]—The great weight of authority in the state courts holds that the Bible itself is not a sectarian book and can be read in the schools to inculcate fundamental morality.

*Vidal v. Girard's Exrs.* (1844), 2 How. 137, 11 L. Ed. 205; *Evans v. Selma Union High School District v. Fresno County*, 193 Cal. 54, 222 P. 801, 802, 31 A. L. R. 1121; *Vollmar v. Stanley* (1927), 81 Colo. 276, 255 P. 610; *Freeman v. Sheve*, 59 L. R. A. 927, 932 (Neb. 1902); *Moore v. Monroe*, 52 Am. Rep. 444 (Iowa 1884); *Nessle v. Hum*, 2 Ohio Dec. 60; *Billard v. Bd. of Education of the City of Topeka*, 2 Ann. Cases 521 (Kan. Sup. Ct. 1904); *Pfeiffer v. Bd. of Education of Detroit*, 49 L.R.A. 536 (Mich. 1898); *Hackett v. Brooksville Graded School District*, 87 S. W. 792, 794, 120 Ky. 608, 69 L.R.A. 592, 117 Am. St. Rep. 599, 9 Ann. Cases 36; *Church v. Bullock (Tex.)*, 109 S. W. 115, 16 L.R.A. (N. S.) 860.

Mr. Justice Jackson, concurring in *McCullum v. Board of Education* (Ill. 1948), 333 U. S. 203-256, said:

"Authorities list 256 separate and substantial religious bodies to exist in the continental United States. Each of them, through the suit of some discontented but unpenalized and untaxed representative, has as good a right as this plaintiff to demand that the courts compel the schools to sift out of their teaching everything inconsistent with its doctrines. If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting [fol. 29] it to constant law suits.

"While we may and should end such formal and explicit instruction as the Champaign plan and can at all times prohibit teaching of creed and catechism and ceremonial and can forbid forthright proselyting in the schools, I think it remains to be demonstrated whether it is possible, even if desirable, to comply with such demands as plaintiff's completely to isolate and cast out of secular education all that some people may reasonably regard as religious instruction. Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting



without the scriptural themes would be eccentric and incomplete, even from a secular point of view. Yet the inspirational appeal of religion in these guises is often stronger than in forthright sermon. Even such a 'science' as biology raises the issue between evolution and creation as an explanation of our presence on this planet. Certainly a course in English literature that omitted the Bible and other powerful uses of our mother tongue for religious ends would be pretty barren. And I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is that, for good or for ill, nearly everything in our culture [fol. 30] worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity—both Catholic and Protestant—and other faiths accepted by a large part of the world's peoples. One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.

"But how one can teach, with satisfaction or even with justice to all faiths, such subjects as the story of the Reformation, the Inquisition, or even the New England effort to found 'a Church without a Bishop and a State without a King,' is more than I know."

That the Bible, or any particular edition, has been adopted by one or more denominations as authentic, or by them asserted to be inspired, cannot make it a "sectarian book". The book itself, to be sectarian, must show that it teaches the peculiar dogmas of a sect as such, and not alone that it is so comprehensive as to include them by the partial interpretation of its adherents. Nor is a book sectarian merely because it was edited or compiled by those of a particular sect. It is not the authorship nor mechanical composition of the book, nor the use of it, but its contents, that give it its character. The question is not whether the version used is canonical or apocryphal. The King James translation of the Bible, or any edition of the Bible, is not a sectarian book and the reading thereof without comment in the public schools does not constitute

sectarian instruction. *Hackett v. Brooksville Graded School* [fol. 31] *Dist., supra.*

If the Bible, particularly the Old Testament, is not a sectarian book, it necessarily follows that a mere reading therefrom, without comment, cannot be called sectarian instruction, and as such, is not in violation of the First or Fourteenth Amendments, even to those persons known as atheists.

Nor is the reading of the Lord's Prayer in the opening exercises of public schools sectarian instruction. *Moore v. Monroe, supra; Billard v. Board of Education, supra; Church v. Bullock, supra; Hackett v. Brooksville Graded School Dist., supra.*

In construing a New Jersey statute in the Everson case, *supra*, the Court held that "We must consider the New Jersey statute in accordance with the foregoing limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the state's constitutional power, even though it approaches the verge of that power."

My conclusion is that a repetition of the Lord's Prayer as a morning exercise, without comment or remark, for the purpose of quieting pupils and preparing them for their daily studies, and a reading from the Old Testament of the Holy Bible, without comment, as the book best adapted from which to teach children and youth the principles of piety, justice, and a sacred regard for truth, love for their country, humanity and a universal benevolence, are certainly not designed to inculcate any particular dogma, creed, belief or mode of worship, and accordingly, the provisions of the New Jersey statutes under review do not contravene the First and Fourteenth Amendments [fol. 32] of the United States Constitution.

Defendants' motion for summary judgment will be granted and plaintiffs' motion necessarily denied.

Dated: February 20, 1950.

Robert H. Davidson, A. J. S. C.

[fol. 33] IN SUPERIOR COURT OF NEW JERSEY LAW DIVISION—  
PASSAIC COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed April 14, 1950

Notice is hereby given that the plaintiffs Donald R. Doremus and Anna E. Klein appeal to the Appellate Division of the Superior Court of New Jersey from the final judgment of the Superior Court of New Jersey, Law Division, Passaic County, granting defendants' motion for summary judgment and denying plaintiffs' motion for summary judgment, entered in this action on March 8, 1950.

Heyman Zimel, Attorney for Plaintiffs.

Dated: April 8th, 1950

[fol. 34] IN SUPREME COURT OF NEW JERSEY

Appeal Docket No. 560

Civil Action..On Appeal

MANDATE ON AFFIRMANCE—Filed Oct. 16, 1950

DONALD R. DOREMUS, et al., Plaintiffs-Appellants,

VS.

BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, and  
the STATE OF NEW JERSEY, Defendants-Respondents

This cause having been duly argued before this Court by Mr. Heyman Zimel, counsel for the appellants and Mr. Henry F. Schenck, counsel for the respondents, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Law Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court—Law Division to be there proceeded



with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

Witness the Honorable Arthur T. Vanderbilt, Chief Justice, at Trenton on the 16th day of October, 1950,

Charles K. Barton, Clerk of the Supreme Court.

[File endorsement omitted.]

[fol. 35] IN SUPREME COURT OF NEW JERSEY

No. A-2 September Term 1950

DONALD R. DOREMUS and ANNA E. KLEIN, Plaintiffs-Appellants,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, and the STATE OF NEW JERSEY, Defendants-Respondents.

Argued September 18, 1950. Decided Oct. 16, 1950

Mr. Heymen Zimel argued the cause for appellants.

Mr. Henry F. Schenck, Deputy Attorney General, argued the cause for respondents. Mr. Theodore D. Parsons, Attorney General, and Mr. Alexander E. Fasoli on the brief. Mr. Albert McCay filed a brief for State Council of the Junior Order of United American Mechanics of the State of New Jersey as *amicus curiae*.

OPINION—Oct. 16, 1950

The opinion of the court was delivered by

Case, J. The judgment under appeal was entered in the Law Division of the Superior Court, Passaic County, and was brought here on our certification. The action was originated under the Declaratory Judgment Act by a proceeding in lieu of prerogative writ to test the constitutionality of R. S. 18: 14-77 and -78. Those statutory provisions are:

18:14-77. "At least five verses taken from that portion of the Holy Bible known as the Old Testament shall be read, or caused to be read, without comment, in each public school classroom, in the presence of the pupils therein assembled, by the teacher in charge, at

the opening of school upon every school day, unless there is a general assemblage of the classes at the opening of the school on any school day, in which event the reading shall be done, or caused to be done, by the principal or teacher in charge of the assemblage and in the presence of the classes so assembled."

18:14-78. "No religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools."

Section 77 was enacted as ch. 263, P. L. 1916, slightly different in arrangement but with the same substance. Section 78 was enacted as sec. 114 of ch. 1 (2nd Special Session), P. L. 1903 (the general school act). Its predecessor was a provision in section 65 of the School Act Revision of 1867, [fol. 36] ch. 179, P. L. 1867, as follows:

"It shall not be lawful for any teacher, trustee, or trustees, to introduce into or have performed in any school receiving its proportion of the public money, any religious service, ceremony or forms whatsoever, except reading the Bible and repeating the Lord's Prayer."

That provision was retained in sec. 65 of the Revision of 1867, (Rev. 1877 p. 1081, sec. 65), and in the amendatory Supplement of 1894 (ch. 102, P. L. 1894, Plac. 220, p. 3052 Gen. Stat. 1895).

Considered with the statute was the directive issued by the defendant Board of Education of the Borough of Hawthorne that "any student may be excused during the reading of the Bible upon request." There was no request that a student be excused. The public schools which provide the occasion for the controversy are supported in part by public funds contributed by the state to the school district for educational purposes and in part by funds raised exclusively in the school district by levy upon taxable property within the school district. There were no disputed facts. On cross motions for summary judgment on the pleading judgment went for the defendants, based on a holding that the statutory proceedings do not contravene the First or the Fourteenth Amendment of the United States Constitution.

Appellants present this line of reasoning: The principle of the separation of the church and state is established in the constitution of the United States, namely, the first and fourteenth amendments which prohibit the intermingling of religious and secular education in the public schools; the reading of the Bible and the reciting of the Lord's Prayer in the public schools are religious services, religious exercises and religious instruction; they are of themselves in aid of one or more religions and in preference of one religion over another; and therefore those acts are contrary to the named constitutional provisions. The gist of the argument is that compliance with the statute necessarily involves sectarian worship and sectarian instructions and therefore violates the Federal Constitution.

The effective parts of the First and Fourteenth Amendments are these:

[fol. 37] I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; \* \* \*"

XIV. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The pertinency of the Fourteenth Amendment is that it carried over to the states the prohibition imposed by the First Amendment upon Congress against impairing religious rights of individuals. Therefore our question is whether the New Jersey statute violates the injunction which the first amendment lays against making a law respecting an establishment of religion or preventing the free exercise thereof.

No one is before us asserting that his religious practices have been interfered with or that his right to worship in accordance with the dictates of his conscience has been suppressed. No religious sect is a party to the cause. No representative of, or spokesman for, a religious body has attacked the statute here or below. One of the plaintiffs is



"a citizen and taxpayer"; the only interest he asserts is just that and in those words, set forth in the complaint and not followed by specification or proof. It is conceded that he is a citizen and a taxpayer, but it is not charged and it is neither conceded nor proved that the brief interruption in the day's schooling caused by compliance with the statute adds cost to the school expenses or varies by more than an incomputable scintilla the economy of the day's work. The other plaintiff, in addition to being a citizen and a taxpayer, has a daughter, aged seventeen, who is a student of the school. Those facts are asserted, but, as in the case of the complainant, no violated rights are urged. It is not charged that the practice required by the statute conflicts with the convictions of either mother or daughter. Apparently the sole purpose and the only function of plaintiffs is that they shall assume the role of actors so that there may be a suit which will invoke a court ruling upon the constitutionality of the statute. Respondents urge that under the circumstances the question is moot as to the plaintiffs-appellants and that our declaratory judgment statute may not properly be used in justification of such a proceeding. Cf. *New Jersey Turnpike Authority vs. Parsons*, 3 N. J. 235; *Massachusetts vs. Mellon*, 262 U. S. 447, at 488, 67 Law Ed. 1078, at 1085, 43 Sup. Ct. 597 (1923). The point has substance but we have nevertheless concluded to dispose of the appeal on its merits.

Was it the intent of the First Amendment that the existence of a Supreme Being should be negated and that the governmental recognition of God should be suppressed? Not that, surely. The temper of the times during which the agitation for and the accomplishment of the amendment was had, the events which led to the adoption of the amendment, the contemporaneous and subsequent interpretation by way of statute and public practice, the very wording of the amendment, all forcefully support that answer.

Instances could be multiplied going to the undeniable result that the Constitution itself assumes as an unquestioned fact the existence and authority of God and that preceding, contemporaneously with and after the adoption of the constitutional amendment all branches of the government followed a course of official conduct which openly accepts the existence of God as Creator and Ruler of the Universe; a course of conduct that has been accepted as not in conflict with the constitutional mandate.

The United States Constitution in Article I, section 7 provides that the President shall have ten days (Sundays excepted) within which to determine whether he will affirm or veto a bill. The essential idea of an oath seems to be that it is a recognition of God's authority and an undertaking by the affiant to accomplish the transaction to which it refers as required by His laws. *Bouvier's Law Dictionary*. The constitution recognized that divine authority by directing that in the alternative an oath or an affirmance be taken in certain instances. With particularity it framed the oath, or affirmance, to be taken by the president. The origin of the privilege, in the alternative, to affirm rather than to take an oath is not to be understood, necessarily, as a concession [fol. 39] to disbelief in God. The privilege was accorded, or at least made more generous, in New Jersey, in 1727 because the Quakers, although a God-fearing group, were conscientiously scrupulous against taking an oath. See Allinson's *Laws*, (New Jersey, 1776), page 75.

The first ten amendments, called the Bill of Rights, were offered and adopted speedily after the adoption of the constitution and were a product of the motives and conditions which culminated in the parent instrument. The confederated colonies and, later, the states organized as a constitutional nation, acknowledged the existence of and bowed before the Supreme Being. The Declaration of Independence, phrased in the political ideology of Thomas Jefferson, frankly grounded its position in the unalienable rights endowed by God, the Creator; made appeal to Him, the Supreme Judge of the world for the rectitude of that position and expressed trust in the Divine Providence for protection in the fulfillment thereof. The articles of confederation recited the beneficent intervention of the Great Governor of the world.

Contemporary construction of a constitutional provision which has been followed since the founding of our government is entitled to the greatest respect. *Ex Parte Richard Quirin*, 317 U. S. 1, 41, 87 Law Ed. 3, 20, 63 Sup. Ct. 2 (1942). *State vs. Wrightson*, 56 N. J. L. 126, 200 (Sp. Ct. 1893). Specifically, Acts by the First Congress, which proposed the first ten amendments, have been judicially considered as of the highest authority in providing a contemporaneous exposition of constitutional provisions. *Patton vs. United States*, 281 U. S. 276, 300, 74 Law Ed. 854, 864, 50 Sup. Ct. 253 (1929); *Myers vs. United States*, 272 U. S. 52, 174, 71

Law Ed. 160, 189, 47 Sup. Ct. 21 (1926). On September 24, 1789, the day the first Congress adopted the resolution submitting the First Amendment to the states, it adopted a resolution requesting the president to recommend to the people "a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity to establish a Constitution of government [fol. 40] ment for their safety and happiness." Benton, T. H. (Ed.), *Annals of Congress*, Abridged by J. C. Rivers (New York, D. Appleton-Century Co., 1858), Vol. I, pp. 914-915. That Congress also adopted a resolution providing for a chaplain for each house (*id.* p. 932); and every session of congress, from that time forward, has been convened with prayer.

Courts have functioned normally since before our national history began upon the assumption of the sanctity of an oath. Public officers uniformly qualify by being sworn. The statute (Tit. 28 § 453, U. S. C. A.) upon the taking of an oath by the justices and judges of the United States courts is illustrative:

"Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: 'I, \_\_\_\_\_ do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as — according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God.'"

The Thanksgiving Proclamation issued annually by the president, founded originally in resolution and continued through the years by tradition, gives, by its continuity and content, a striking reflection of the acceptance by our nation, and specifically by our government, of the idea and the existence of God. Our coined dollar for years beyond memory has carried the inscription "In God We Trust". It seems, *McCullum vs. Board of Education*, 333 U. S. 203, 254, 92 Law Ed. 649, 680, (dissenting opinion of Mr. Justice Reed) that not only does Congress still have in each house a chaplain who daily invokes divine blessings and guidance for the proceedings but that the armed forces have had com-



missioned chaplains from early days and that these chaplains, so commissioned, conduct public services in accordance with the liturgical requirements of their several faiths; and that chaplains are attached to each of the schools, governmentally supported and controlled; for the training of military and naval cadets. The United States Congress has enacted (Sec. 1464 New Title 18 Crimes and Criminal Procedure Act of June 25, 1948, U. S. C. A.) that "whoever [fol. 41] utters any \* \* \* profane language by means of radio communication shall be fined not more than \$10,000.00 or imprisoned not more than two years, or both". In our national anthem we reverently sing:

"\* \* \* May the heav'n rescued land, Praise the  
Power that hath made and preserved us a nation; Then  
Conquer we must, when our cause it is just, And this  
be our motto—'In God is our trust,' "

What has been said of the federal government could almost be repeated *mutatis mutandis*, with reference to our state. For illustrations: with respect to blasphemy, our own statute, R. S. 2:165-2, provides that any person who shall willfully blaspheme the name of God shall be guilty of a misdemeanor. An early statute, III Anne, 1704, Allinson p. 3, punished, *inter alia*, "cursing" and "swearing". But the Crimes Act of March 18, 1796, Paterson's Laws, page 211, provided in section 20 the statutory cast that has come down through the various revisions without great change. Elmer's Digest (1838) p. 105, sec. 20. Nixon's Digest (1868) p. 195, sec. 22. Revised Statutes 1874 p. 144, sec. 66. Rev. 1877, p. 238, sec. 66, ch. 235, sec. 73, P. L. 1898, 2 C. S. p. 1770 § 73. Property used for religious purposes has long been and is largely exempt from taxation. Pamph. Laws 1851, p. 272; ch. 372, sec. 1, Pamph. Laws 1931; N. J. S. A. 54:4-3.6. Beyond that it may suffice for the purpose of showing our governmental attitude to refer to a persistent and specific recognition of "Almighty God" in the several constitutions of our state. The first constitution, adopted July 2nd, 1776, provided (Art. XVIII) that "No person shall ever within this colony be deprived of the inestimable privilege of worshiping Almighty God in a manner agreeable to the dictates of his own conscience; nor under any pretense whatsoever compelled to attend any place of worship, contrary to his own faith and judgment". The second

constitution, effective September 2nd, 1844, contained this preamble:

"We, the people of the State of New Jersey, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations, do ordain and establish this Constitution:"

[fol. 42] It also repeated, in Art. I, par. 3, the language quoted *supra* (except the words "ever within this colony") from the first constitution. In both respects our present constitution, adopted in 1947, follows the 1844 instrument.

The United States Supreme Court, speaking through Mr. Justice Brewer in *Church of the Holy Trinity vs. United States*, 143 U. S. 457, 36 Law. Ed. 226, 12 Sup. Ct. 511 (1892), found no dissonance in the provisions of the first amendment and various official declarations placing God at the apex of all things and said: "There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations, of private persons; they are organic utterances; they speak the voice of the entire people."

Appellants rely mainly on the decisions in the United States Supreme Court in *Everson vs. Board of Education*, 330 U. S. 1, 91 Law Ed. 711 (1947), and *McCollum vs. Board of Education*, *supra*, (1948):

In the *Everson* case a New Jersey statute authorized the local school districts to make rules and contracts for the transportation of children to and from schools. A local school board, pursuant to the statute, authorized reimbursements to parents of money expended by them for the bus transportation of their children on regularly operated buses. A part of the money was for the payment of transportation of children to Catholic parochial schools. A taxpayer challenged the right of the board to reimburse parents of parochial school students and contended that the resolution violated both the State and the Federal Constitutions. The highest court of this state held (133 N. J. L. 350) that neither the statute nor the resolution was in conflict with either the State Constitution or the Federal Constitution. On appeal the United States Supreme Court decided that the statute and the resolution did not violate either the due

process clause of the Fourteenth Amendment or the provision of the First Amendment that no law shall be made "respecting an establishment of religion".

[fol. 43] A decision holding that a state may use tax moneys to transport children to a parochial school without violating the coinstitutional provision against an establishment of religion is not, we conceive, an effective holding against the constitutionality of a state statute directing the reading without comment of a few Bible verses in a classroom. The issues are quite different. And the reasoning of the opinion does not, we think, have the pertinency for which appellants argue.

In the *McCullum* case, the facts are shortly stated in a summary prefixed to the case as reported in 92 Law. Ed. 649, as follows: "A local board of education in Illinois agreed to the giving of religious instruction in the schools under a 'released time' arrangement whereby pupils whose parents signed 'request cards' were permitted to attend religious-instruction classes conducted during regular school hours in the school building by outside teachers furnished by a religious council representing the various faiths, subject to the approval and supervision of the superintendent of schools. Attendance records were kept and reported to the school authorities in same way as for other classes; and pupils not attending the religious instruction classes were required to continue their regular secular studies." The court held that the facts showed the use of tax-supported property for religious instruction and a close co-operation between the school authorities and the religious council in promoting religious education, and, further, that the tax-supported public school buildings were used for the dissemination of religious doctrines and the state afforded sectarian groups invaluable aid in that it helped to provide pupils for their religious classes through use of the state's compulsory public school machinery. Legally the court found that the arrangement was not a separation of church and state and therefore was in violation of the First Amendment. The facts are, upon their face, so different from ours that no discussion of them seems to be necessary. The outstanding feature of that case was that school property was being used for sectarian instruction and the correlated fact in the present case is that there was no sectarian act.

[fol. 44] Appellants contend that the statutory direction provides for religious instruction and religious worship and



is in aid of one or more religions and in preference of one religion over another; and it is upon that argument that they seek support in the *Everson* and *McCullum* decisions. No charge is made that, in the reading, passages were selected with the purpose or the result of giving a sectarian bias; the Bible itself is indicted as sectarian. We are of the opinion that the characterizations of the statute and of the Book are not sound, that the holdings in the cited cases involve essential elements wholly lacking in the instant case, and that consequently the decisions are not in point and are not binding. Further, we think that the reasoning followed in reaching those decisions was not intended to, and does not, reach the facts of the present case.

Appellants concede that there are twelve states which prescribe the reading of the Bible in public school classes: Alabama, Arkansas, Delaware, Florida, Georgia, Idaho, Kentucky, Maine, Massachusetts, Pennsylvania, Tennessee and New Jersey; and that the statutes of five other states make its use permissive: Indiana, Iowa, Kansas, North Dakota and Oklahoma; and also that the cases on the subject which sustain the reading of the Bible (among them decisions by the courts of Texas, Colorado, Michigan, Minnesota and New York) outnumber the cases in which Bible reading was interdicted. It could be added that a bylaw of the Board of Education (Bylaws, Dist. of Columbia Board of Education, chap. 6, sec. 4) requires the reading of the Bible and the Lord's Prayer in the public schools of the District of Columbia; that a Mississippi statute (Mississippi Code, 1942, Title 24, sec. 6672) requires a course in the Principles of Morality and Good Manners; the same to include "the mosaic ten commandments"; and that the Bible is read in a large number of schools in many states where the statutes are silent on the subject.

Appellants further state that the reading of the Bible in the public schools has been struck down in Illinois, Louisiana, Wisconsin and Ohio; and that while decisions upholding the reading of the Bible are more numerous, the better reasoning, "considered in the light of the United States Supreme Court decisions in the *Everson* and *McCullum* cases", leads inevitably to the conclusion of unconstitutionality. We have given our reasons for believing that the last named Supreme Court decisions do not lead to or lean toward that conclusion; and we are not impressed by the alleged pertinency of the state decisions cited by appel-

lants. *Finger vs. Weedman*, 226 N. W. 348 (S. Dakota Sup. Ct. 1929), while adverse to Bible reading in the schools does not appear to have held the state statute unconstitutional and said that the public schools could, without opposition, "teach that there is an All-Wise Creator to whom we owe love, reverence, and obedience". The Ohio case of *Board of Education vs. Minor*, 23 Ohio St. 211 (1872) was to the effect that inasmuch as the constitution of the state did not enjoin or require religious instruction or the reading of religious books in the public schools the court had no rightful authority to command the boards of education as to what instruction shall be given or what books should be read. The Wisconsin case of *State ex rel. Weiss vs. District Board of Education*, 76 Wis. 177, 7 L. R. A. 330 (Wisconsin Sup. Ct. 1890), arose on a petition to compel the reading of the Bible, and the holding was that the state constitution forbade the practice. *Ring vs. Board of Education*, 245 Ill. 334, 92 N. E. 251 (Illinois Sup. Ct. 1910), held that the First Amendment to the Federal Constitution left the states free to enact such laws as they might deem proper with respect to religion, restrained only by limitations of the respective state constitutions, but that the reading of the Bible, the singing of hymns and the repeating of the Lord's Prayer were in violation of the provisions of the constitution of the State of Illinois. In *Herold vs. Parish Board*, 136 La. 1034, 68 So. 116, 56 L. R. A. (N. S.) 1915D 941 (Louisiana Sup. Ct. 1915), the headnotes, drawn by the judge who wrote the opinion, stated that the reading of the Bible, including the Old and New Testaments, in the public schools, was a preference given to Christians and a discrimination made against Jews, and therefore was a violation of the constitution of the State [fol. 46] of Louisiana. The opinion mentioned the First Amendment of the Federal Constitution, but it is evident that (1) the holding was not on that provision and (2) that the holding turned largely upon the inclusion of the New Testament in the school exercises there under review. Those cases are appellants' chief reliance in that branch of their argument which goes to the position of states adverse to Bible reading.

Cooley (Constitutional Limitations, Eighth Edition, Vol. 2, p. 966) lists five things which are not lawful under any of the American constitutions, namely, (1) any law respecting an establishment of religion, (2) compulsory support, by taxation or otherwise, of religious instruction, (3) com-

pulsory attendance upon religious worship, (4) restraints upon the free exercise of religion according to the dictates of the conscience, (5) restraints upon the expression of religious belief. But, he adds (p. 974), "while thus careful to establish, protect, and defend religious freedom and equality, the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in finite and dependent beings. Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the great Governor of the Universe, and of acknowledging with thanksgiving His boundless favors, of bowing in contrition when visited with the penalties of His broken laws".

We consider that the Old Testament, because of its antiquity, its content, and its wide acceptance, is not a sectarian book when read without comment. Cf. *Vidal vs. Girard's Executors*, 2 Howard 127, 200, 11 Law Ed. 205, 235 (1844); *Hackett vs. Brooksville Graded School District*, 120 Ky. 608, 87 S. W. 792, 69 L. R. A. 592 (Kentucky Court of Appeals 1905). It is accepted by three great religions, the Jewish, the Roman Catholic and the Protestant, and, at least in part, by others. There are different versions, [fol. 47] but the statute makes no distinction. The adherents of those religions constitute the great bulk of our population. There are religious groups other than the Jewish, the Roman Catholic and the Protestant but in this country they are numerically small and, in point of impact upon our national life, negligible. This is not a criticism, simply the statement of a fact from which it is to be gathered that the tenets of these minor groups had no vital part in the formation of our national character. And it is not to say that because a religious group is small, it thereby loses its constitutional rights or that it is not entitled to the protection of those rights. The application is that some of our national incidents are developments from the almost universal belief in God which so strongly shaped and nurtured our people during the colonial period and the formative years of our constitutional government, with the result that we accept as a commendable part of our public life certain conditions and practices which in a country of



different origins would be rejected; just as some acts would be offensive here which, as Cooley (*supra*, p. 975) says, "in a Mahometan or Pagan country might be passed by without notice, or even be regarded as meritorious". Again, take the instance of an atheist: ~~he has all the protection~~ of the constitution; he may not be held to any religious function or to the support, financial or otherwise, of a religious establishment; he may entertain his belief or the lack of belief as he will; but he lives in a country where theism is in the warp and woof of the social and the governmental fabric and he has no authority to eradicate from governmental activities every vestige of the existence of God. He could not, we hypothesize, prevent, on constitutional grounds, the houses of Congress from opening their sessions with prayer to the Almighty for guidance in their deliberations, even though he were a member of Congress, or from maintaining chaplains for service with the armed forces, even though he were a member of those forces. Cf. *Lewis vs. Board of Education*, 157 Misc. 520, 285 N. Y. Supp. 164 (1935), modified 247 App. Div. 106, 286 N. Y. Supp. 174; rehearing denied, 247 App. Div. 873, 288 N. Y. Supp. 751; [fol. 48] appeal dismissed 276 N. Y. 490, 12 N. E. 2d 172 (N. Y. Ct. of Appeals 1937). A situation so supposed would be more exposed than our own to a charge of sectarianism because the argument might point to the sectarian affiliations of the clergyman or the chaplain. We are speaking in terms of the constitution upon the situations which that document was intended to reach, specifically upon whether or not the inhibition against the making of a law respecting an establishment of religion or prohibiting the free exercise thereof is violated by the reading, without comment, of a few verses, daily, in our public schools, from the Old Testament, and upon whether a statute which requires that to be done sets up religious instruction, or religious worship; which, within the meaning of our cases, is in aid of one or more religions, or prefers one religion above another. The reading does not, obviously, effect or tend to effect the setting up, or the establishment, of a religion and, just as obviously, it does not prohibit the free exercise of any religion. We have noted the absence of allegation or proof that the plaintiffs or either of them are harmed by the statute of which they complain and we have withheld from considering a disposal of the case upon that technical ground; but we should, and do, recall that no burden of participa-

tion is put upon a pupil by the statute, and that by the regulation of the school board under whose jurisdiction the issue arose a pupil would, upon request, be excused from the classroom during the brief exercises. The contention that one religion is preferred above another is vague and intangible; no religious group is a party to the cause; no person or sect is charging that his or its beliefs are prejudiced. The incidents which were condemned in the McCollum case as being contrary to the separation of church and state appear to be entirely absent.

As to the permissive repeating of the Lord's Prayer: That short supplication to the Divinity was given its name because it was enjoined by Christ as an appropriate form of prayer. It is used by Roman Catholics and Protestants with slight variations. But nothing therein is called to our attention as not proper to come from the lips of any be- [fol. 49] liever in God, His fatherhood, and His supreme power. Christ was a Jew and He was speaking to Jews; and it is said, on excellent Jewish authority, (Dr. Philip Bernstein, Rabbi of the Temple B'reth Kodesh, Rochester, N. Y., "What the Jews Believe", Life Magazine September 11, 1950, p. 161), that the prayer was based upon the ancient Jewish prayer called "The Kaddish" — "Exalted and hal- lowed be the name of God throughout the world . . . May His Kingdom come, His will be done". We find nothing in the Lord's Prayer that is controversial, ritualistic or dogmatic. It is a prayer to "God, our Father". It does not contain Christ's name and makes no reference to Him. It is, in our opinion, in the same position as is the Bible reading and needs no special comment beyond what has just been said. Cf. *Church vs. Bullock*, 109 S. W. 115, 16 L. R. A. (N. S.) 860 (Texas Supreme Ct. 1908).

While it is necessary that there be a separation between church and state, it is not necessary that the state should be stripped of religious sentiment. It may be a tragic experience for this country and for its conception of life, liberty and the pursuit of happiness if our people lose their religious feeling and are left to live their lives without faith. Who can say that those attributes which Thomas Jefferson in his notable document called "unalienable rights" endowed by the Creator may survive a loss of belief in the Creator? The American people are and always have been theistic. Cf. *Church of the Holy Trinity vs. United States*, *supra*. The influence which that force contributed to our

origins and the direction which it has given to our progress are beyond calculation. It may be of the highest importance to the nation that the people remain theistic, not that one or another sect or denomination may survive, but that belief in God shall abide. It was, we are led to believe, to that end that the statute was enacted; so that at the beginning of the day the children should pause to hear a few words from the wisdom of the sages and to bow the head in humility before [fol. 50] the Supreme Power. No rites, no ceremony, no doctrinal teaching; just a brief moment with eternity. Great results follow from elements which to human perception are small. It may be that the true perspective engendered by that recurring short communion with the eternal forces will be effective to keep our people from permitting government to become a man-made robot which will crush even the constitution itself. Our way of life is on challenge. Organized atheistic society is making a determined drive for supremacy by conquest as well as by infiltration. Recent history has demonstrated that when such a totalitarian power comes into control it exercises a ruthless supremacy over men and ideas, and over such remnants of religious worship as it permits to exist. We are at a crucial hour in which it may behoove our people to conserve all of the elements which have made our land what it is. Faced with this threat to the continuance of elements deeply imbedded in our national life the adoption of a public policy with respect thereto is a reasonable function to be performed by those on whom responsibility lies. Subject to constitutional limitations, the legislature has exclusive jurisdiction over matters of public policy, *Schenley Products Co. v. Franklin Stores Co.*, 124 N. J. Eq. 100, 105 (E. & A. 1937), *State vs. Dongvan*, 129 N. J. L. 478, 486 (Sup. Ct. 1943), and the courts should be very sure of their ground before they restrict that legislative field.

The statute under attack has been on the statute books for 47 years, and the substance of it, that is, the permission to read the Bible and to repeat the Lord's Prayer, for more than eighty years. It is common knowledge that the schools have conducted those exercises throughout such periods. This has been without question until now. As was said in *Legg vs. Passaic County*, 122 N. J. L. 100 (Sup. Ct. 1939), affirmed, 123 N. J. L. 263 (E. & A. 1939), " . . . one of the fundamental policies of our jurisprudence is not to declare unconstitutional a statute which has been in force



without any substantial challenge for many years unless its unconstitutionality is obvious". To same effect: *Attorney [fol. 51] General vs. McGuinness*, 78 N. J. L. 346, 371 (E. & A. 1909), *Jersey City vs. Kelly*, 134 N. J. L. 239 (E. & A. 1946), *Robertson vs. Baldwin*, 165 U. S. 275, 41 Law. Ed. 715, at 719, 17 Sup. Ct. 326 (1897).

Manifestly, as we have indicated, the disputed statutes do not impinge upon the strict wording of the First Amendment. They do not go to the establishment of religion or against the free exercise thereof. How far the intendment of the amendment goes beyond the literal phrasing thereof has never been determined. But it is clear, we think, that the sense of the amendment does not serve to prohibit government from recognizing the existence and sovereignty of God and that the motives which inspired the amendment and the interpretation given by the several departments of the Federal Government concurrently with and subsequent to the submission and adoption of the amendment are inconsistent with any other conclusion. It is a cardinal rule in the construction of constitutional and statutory enactments that the provision made by way of remedy shall be studied in the light of the evil against which the remedy was erected. The conditions which gave rise to the First Amendment have been graphically portrayed by Mr. Justice Black in the opinion written by him for the United States Supreme Court in the *Everson* case; a factual background which doubtless ruled the decisions in that case and in the *McCullum* case; and a background to which, as we believe, the facts in the instant case have no real similarity. The lure is to color all things, including fundamental facts, with the philosophy prevailing at the hour of observation; but facts are facts, stark and naked; they do not change. The fact is that the First Amendment does not say, and so far as we are able to determine was not intended to say, that God shall not be acknowledged by our government as God. Our view is that a prohibition which is not in the language of the amendment and which is contrary to the intention of those who framed and adopted the instrument should not now be read into it. We consider that the Old Testament and the Lord's Prayer, pronounced without comment, are not sectarian, and that [fol. 52] the short exercise provided by the statute does not constitute sectarian instruction or sectarian worship but is a simple recognition of the Supreme Ruler of the Universe and a deference to His majesty; that since the exercise is

not sectarian, no justiciable sectarian advantage or disadvantage flows therefrom; and that, in any event, the presence of a scholar at, and his participation in, that exercise is, under the directive of the Board of Education, voluntary.

We conclude that the statutes are not in violation of the Federal Constitution and that the judgment below should be affirmed.

[fol. 53] IN SUPREME COURT OF NEW JERSEY

[Title omitted]

PETITION FOR APPEAL—Filed January 19, 1951

Considering themselves aggrieved by the final mandate and judgment of this court entered on October 16, 1950, Donald R. Doremus and Anna E. Klein, plaintiffs herein, do hereby pray that an appeal be allowed to the Supreme Court of the United States from said final mandate and judgment and from each and every part thereof; that citation be issued in accordance with law; that an order be made with respect to the appeal bond to be given by said plaintiffs; and that the amount of security be fixed by the order allowing the appeal; and that the material parts of the record, proceedings and papers upon which said final judgment and mandate was based duly authenticated be sent to the Supreme Court of the United States in accordance with the rules in such case made and provided.

Respectfully submitted, Heyman Zimel, Attorney for  
Plaintiffs-Appellants.

[fol. 54] [File endorsement omitted.]

[fol. 55] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed January 19, 1951

Donald R. Doremus and Anna E. Klein having made and filed their petition praying for an appeal to the Supreme Court of the United States from the final judgment and

mandate of this court in this cause entered on October 16, 1950, and from each and every part thereof, and having presented their assignment of errors and prayer for reversal and their statement as to the jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided.

Now, therefore, it is hereby ordered that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that the appellants post a good and sufficient cost bond in the sum of \$250.00 as security for costs of the appeal.

It is further ordered that citation shall issue in accordance with law.

Harold H. Burton, Associate Justice of the Supreme Court of the United States.

Dated this 12th day of January, 1951.

[fol. 55a] [File endorsement omitted.]

[fols. 56-57] Citation in usual form, filed Jan. 19, 1951, omitted in printing.

[fol. 58] IN SUPREME COURT OF NEW JERSEY

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL Filed  
January 19, 1951

Donald R. Doremus and Anna E. Klein, plaintiffs in the above entitled cause, in connection with their appeal to the Supreme Court of the United States, hereby file the following assignment of errors upon which they will rely in their prosecution of said appeal from the final judgment of the Supreme Court of New Jersey entered on October 16, 1950.

The Supreme Court of New Jersey erred:

1. In affirming the judgment of the Superior Court of New Jersey, Law Division, which granted the defendants' motion for summary judgment and denied the plaintiffs' motion for summary judgment.

2. In holding and concluding that Title 18, Section 14-77 of the Revised Statutes of New Jersey, which required that



at least five verses from that portion of the Holy Bible known as the Old Testament shall be read, or caused to be read, without comment, in each public school classroom or in the general assemblage of classes, at the opening of each school day, is constitutional and does not contravene the provisions of the First Amendment and the Fourteenth Amendment of the United States Constitution.

[fol. 59] 3. In holding and concluding that Title 18, Section 14-78 of the Revised Statutes of New Jersey, which excepts the reading of the Bible and the repeating of the Lord's Prayer from a prohibition against holding any religious service or exercise in any school receiving any portion of the moneys appropriated for the support of public schools is constitutional and not contrary to the provisions of the First Amendment and the Fourteenth Amendment of the United States Constitution.

4. In holding and concluding that the Old Testament of the Holy Bible is not a sectarian book within the prohibition of establishment of religion clause of the First Amendment and the privileges and immunities clause of the Fourteenth amendment of the United States Constitution.

5. In failing to hold and conclude that the compulsory reading from the Holy Bible in the classrooms of the Public Schools of the State of New Jersey is a practice which favors one or more religions, is in aid of one or more religions, and is a preference of one religion over another, contrary to the provisions of the First Amendment and the Fourteenth Amendment of the United States Constitution.

6. In failing to hold and conclude that the permissive repeating of the Lord's Prayer in the classrooms of the public schools of the State of New Jersey is a practice which favors one or more religions, is in aid of one or more religions, and is a preference of one religion over another, contrary to the provisions of the First Amendment and the Fourteenth Amendment of the United States Constitution.

7. In failing to hold and conclude that the provisions of the Revised Statutes 18:14-77 and 18:14-78 are repugnant to the provisions of the First Amendment and the Fourteenth [fol. 60] Amendment of the United States Constitution and to declare the said statutes null and void.

8. In failing to prohibit and restrain the defendants or either of them from observing the provisions of the afore-said statutes and from engaging in the practices set forth in the said statutes.

WHEREFORE, plaintiffs Donald R. Doremus and Anna E. Klein, pray that the final judgment of the Supreme Court of New Jersey be reversed, and for such other relief as the Court may deem fit and proper.

Heyman Zimel, Attorney for Plaintiffs-Appellants.

[fols. 61-65] [File endorsement omitted.]

[fol. 66] IN SUPREME COURT OF NEW JERSEY

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed Jan. 19, 1951

TO: The Clerk of the Supreme Court of New Jersey:

You will please prepare a transcript of the record in the above-entitled cause to be transmitted to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. Complaint.
2. Answer of Defendant Board of Education.
3. Answer of Defendant State of New Jersey.
4. Pretrial Conference Order.
5. Final Judgment.
6. Memorandum of Decision.
7. Notice of Appeal.
8. Mandate on Affirmance.
9. Opinion of the Supreme Court of New Jersey.
10. Petition for Appeal.
11. Order Allowing Appeal.
12. Citation on Appeal.
13. Assignment of Errors and Prayer for Reversal.

[fol. 67] 14. Statement of Jurisdiction of the Supreme Court of the United States.

15. Statement of Plaintiffs-appellants Directing Attention to Paragraph 3 of Rule 12 of Revised Rules of the Supreme Court of the United States.

16. Certificate of Service of Notice of Appeal.

17. This Praecipe.

Heyman Zimel, Attorney for Plaintiffs-Appellants

Dated: January 15, 1951.

[fol. 68] [File endorsement omitted.]

[fol. 69] IN SUPREME COURT OF NEW JERSEY

[Title omitted]

PRAECIPE FOR ADDITIONAL PORTIONS OF TRANSCRIPT—Filed  
Jan. 31, 1951

TO: The Clerk of the Supreme Court of New Jersey:

You will please prepare additional transcript of the record in the above-entitled cause to be transmitted to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. Statement of appellees making against the jurisdiction of the Supreme Court of the United States to review, on appeal the judgment in question, including appellees' motion to dismiss or affirm the appeal.

(s) Theodore D. Parsons Attorney General of New Jersey, Counsel for Appellee, State of New Jersey.

(s) Alexander E. Fasoli, Counsel for Appellee, Board of Education of the Borough of Hawthorne, New Jersey.

(s) Henry F. Schenk Deputy Attorney General of Counsel.

Dated: January 31, 1951.

[fol. 70] [File endorsement omitted.]

[fol. 71] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 72] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed March 2, 1951

(a) Appellants adopt for their statement of points upon which they intend to rely on in their appeal to this Court, the points contained in their Assignment of Errors heretofore filed.



(b) Appellants designate the entire record, as filed in the above entitled case, for printing by the Clerk of this Court.

Heyman Zimel, Counsel for Appellants

[fol. 72a] Service of a copy of the within instrument is hereby acknowledged this 28th day of February 1951.

(s) Theodore D. Parsons, Attorney for Defendant,  
State of New Jersey.

Service of a copy of the within instrument is hereby acknowledged this 21st day of February, 1951.

(s) Alexander E. Fasoli, Attorney for Defendant,  
Board of Education.

[fol. 72b] [File endorsement omitted.]

[fol. 7] SUPREME COURT OF THE UNITED STATES

ORDER POSTPONING FURTHER CONSIDERATION OF THE QUESTION  
OF JURISDICTION ETC.—March 12, 1951.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court and of the motion to dismiss or affirm is postponed to the hearing of the case on the merits.

Endorsed on Cover: file no. 55,062 New Jersey, Supreme Court, term no. 5561, Donald R. Doremus and Anna E. Klein, Appellants, vs. Board of Education of the Borough of Hawthorne and the State of New Jersey. Filed February 16, 1951. Term No. 556 O.T. 1950.

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FEB 16 1951

CHARLES ELMORE CROPLEY  
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950 51

No. 556 9

DONALD R. DOREMUS AND ANNA E. KLEIN,  
*Appellants,*  
vs.

BOARD OF EDUCATION OF THE BOROUGH OF  
HAWTHORNE AND THE STATE OF NEW JERSEY

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

STATEMENT AS TO JURISDICTION

KEYMAN ZINEL,  
*Counsel for Appellants.*

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**SUPREME COURT OF NEW JERSEY**

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**APPEAL DOCKET No. 560**

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**DONALD R. DOREMUS AND ANNA E. KLEIN,**  
*Plaintiffs-Appellants*  
vs.

**BOARD OF EDUCATION OF THE BOROUGH OF  
HAWTHORNE, AND THE STATE OF NEW JERSEY,**  
*Defendants-Respondents*

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**STATEMENT AS TO JURISDICTION**

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In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiffs-appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment and mandate of the Supreme Court of New Jersey entered in this cause.

**Opinions Below**

The opinion of the Supreme Court of New Jersey is reported in 5 N. J. 435, 75A2d 880. A copy of the opinion of the Superior Court of New Jersey, Law Division, which was affirmed by the said Supreme Court of New Jersey is reported in 7 N. J. Super. 442, 71A 2d 732. A copy of the opinion of the Supreme Court of New Jersey, a copy of

the mandate on affirmance and a copy of the opinion of the Superior Court Law Division are attached hereto as Appendix A.

### **Jurisdiction**

The judgment and mandate of the Supreme Court of New Jersey was entered on October 16, 1950. A Petition for Appeal is presented to the Supreme Court of New Jersey herewith, to wit; on the 12th day of January, 1951. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1257 (2), which provides for the review by the Supreme Court of the United States by appeal of a final judgment rendered by the highest court of the state where there is drawn in question the validity of a statute of a state on the ground that it is repugnant to the Constitution and the decision is in favor of its validity. In this case the constitutionality of two statutes of the State of New Jersey with respect to the reading of the Holy Bible known as the Old Testament and the reciting of the Lord's Prayer in the public schools of the state was brought in question. The particular statutes involved are cited below. The plaintiffs charge that these statutes were repugnant to the Constitution of the United States; specifically, the First and Fourteenth Amendments to said Constitution. The Superior Court of New Jersey, Law Division, and the Supreme Court of New Jersey, the highest court of the state, determined that these statutes were valid and not repugnant to the First and Fourteenth Amendments of the United States Constitution. This brings the case squarely within the provisions of Title 28, United States Code, Section 1257 (2). The Federal question arising under the United States Constitution was raised by plaintiffs in the first pleading filed by them, to



wit: the Complaint, in bringing these proceedings before the Superior Court of New Jersey, Law Division.

### Statutes Involved

The statutes involved are Revised Statutes of New Jersey 18:14-77 and 18:14-78.

R. S. 18:14-77, provides:

"At least five verses taken from that portion of the Holy Bible known as the Old Testament shall be read, or caused to be read, without comment, in each public school classroom, in the presence of the pupils therein assembled, by the teacher in charge, at the opening of school upon every school day, unless there is a general assemblage of the classes at the opening of the school on any school day, in which event the reading shall be done, or caused to be done, by the principal or teacher in charge of the assemblage and in the presence of the classes so assembled."

R. S. 18:14-78 provides:

"No religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools."

The First and Fourteenth Amendments to the United States Constitution provide in part:

I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

XIV. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

### Question Presented

Is a state law such as Title 18, Section 14-77 of the Revised Statutes of New Jersey, which requires the daily reading of a portion of the Holy Bible known as the Old Testament in each public school classroom of the state repugnant to the First and Fourteenth Amendments of the United States Constitution; and is a statute such as Title 18, Section 14-78 of the Revised Statutes of New Jersey, which permits the repeating of the Lord's Prayer and the reading of the Bible in the public schools of the state repugnant to the First and Fourteenth Amendments of the United States Constitution?

### Statement

The cited statutes of the State of New Jersey in the first instance prescribes and requires the daily reading from that portion of the Holy Bible known as the Old Testament in every public school classroom of the state; and, in the second instance excepts from a general provision against religious services or exercises in the public schools of the state, the reading of the said portion of the Holy Bible and the reciting of the Lord's Prayer. The statute provides that the verses of the Holy Bible are to be read without comment.

The State of New Jersey is the defendant in this suit, the other defendant being the Board of Education of the Borough of Hawthorne, which, the parties admit, engaged in the reading of the verses from the Bible and reciting of the Lord's Prayer in the schools and classrooms under its control. By stipulation, all parties admitted that any child who objected to the practice could be excused

from the classroom during such exercises. Plaintiffs are (a) the mother of a student in the Hawthorne public school and (b) a taxpayer of the State of New Jersey, it being admitted that the schools of the defendant Borough of Hawthorne receive monies from the State of New Jersey appropriated for the support of public schools.

Plaintiffs maintain that the activities in question are repugnant to the First Amendment of the United States Constitution, the provisions of which have been made applicable to the states by the Fourteenth Amendment of the United States Constitution. *Gillow v. New York*, 268 U. S. 652 (1925), *United States v. Bullard*, 322 U. S. 78 (1944), *McCullum v. Board of Education*, 333 U. S. 203 (1948). The Superior Court of the State of New Jersey, Law Division, in the first instance determined that the activities questioned were not unconstitutional and this holding was affirmed by the highest court of the state of New Jersey, the Supreme Court of the State of New Jersey.

### **The Questions Are Substantial**

The issue involved in this appeal is similar to that raised in and decided by the case of *McCullum v. Board of Education*, 333 U. S. 203 (1948). That case and this appeal both involved the intermingling of religious exercises with the compulsory education system of a state. In the *McCullum* case, the Supreme Court of the United States determined that a practice in the State of Illinois of releasing the children of the public schools for periods of religious education in the schools was repugnant to the First and Fourteenth Amendments of the United States Constitution. In this appeal the religious practices involved are the compulsory reading of verses from the Old Testament and the permissive reciting of the Lord's Prayer.

The United States Supreme Court in the *McCullum* case clearly determined that the First and Fourteenth Amend-



ments of the United States Constitution prohibited any state from passing laws in aid of one religion, in aid of all religions, or which preferred one religion over another.

The appellants maintained that the two statutes of the State of New Jersey here involved clearly provide for practices which are in aid of several religions and which prefer one or more religions over other religions. The Lord's Prayer is distinctly the prayer of one particular religion, to wit: the Christian religion, and to permit its recital in the public school classrooms of the state while banning all other religious services is a preference of the Christian religion over all other religions. In fact, the Lord's Prayer itself has two versions, one of which is not approved by the Catholic church, so that the reciting of a particular version of the Lord's Prayer is actually a preference of one Christian sect over other Christian sects.

This is true also with respect to the prescribed reading of verses from that section of the Holy Bible known as the Old Testament. The Old Testament is the basic religious book of the Christian and Jewish religions; compulsory reading from it in the public schools of the state is thus a preference of those religions over all other religions. Even if no taint of sectarianism is attributed to the Old Testament, nevertheless its compulsory reading is in aid of all religions within the interdiction of the *McCullum* case. Moreover, there are extant at least three major versions of the Old Testament, each of which is deemed as authentic by their respective dominant religious sects. These versions have many variances of great canonical importance to the respective religions; therefore, the use of any one version of the Old Testament, *ipso facto*, is a preference of one religion over others and a discrimination against the others, thus actually compelling a person to worship, in a public school, contrary to his own conscience.

Appellants maintain that the statutes of the State of New Jersey here in question are precisely such a violation of the functions of government and of religion as is prohibited by the First and Fourteenth Amendments of the United States Constitution and the decisions of the United States Supreme Court which have interpreted those amendments.

Similar statutes exist in other jurisdictions and appellants believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

HEYMAN<sup>o</sup> ZIMEL,  
*Attorney for Plaintiffs-Appellants.*

## APPENDIX A.

SUPREME COURT OF NEW JERSEY, SEPTEMBER  
TERM 1950

NO. A-2

DONALD R. DOREMUS AND ANNA E. KLEIN, Plaintiffs-  
Appellants,

VS.

BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE AND  
THE STATE OF NEW JERSEY, Defendants-Respondents

Argued September 18, 1950. Decided October 16, 1950.

Mr. Heyman Zimel argued the cause for appellants.

Mr. Henry F. Schenck, Deputy Attorney General, argued  
the cause for respondents. Mr. Theodore D. Parsons,  
Attorney General, and Mr. Alexander E. Fasoli on the brief.Mr. Albert McCay filed a brief for State Council of the  
Junior Order of United American Mechanics of the State  
of New Jersey as *amicus curiae*.

The opinion of the court was delivered by

CASE, J.

The judgment under appeal was entered in the Law Division of the Superior Court, Passaic County, and was brought here on our certification. The action was originated under the Declaratory Judgment Act by a proceeding in lieu of prerogative writ to test the constitutionality of R.S. 18:14-77 and -78. Those statutory provisions are:

18:14-77. "At least five verses taken from that portion of the Holy Bible known as the Old Testament shall be read, or caused to be read, without comment, in each public school classroom, in the presence of the pupils therein assembled, by the teacher in charge, at the opening of school upon every school day, unless there is a general assemblage of the classes at the opening of the school on any school day, in which event"



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the reading shall be done, or caused to be done, by the principal or teacher in charge of the assemblage and in the presence of the classes so assembled."

18:14-78. "No religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools."

Section 77 was enacted as ch. 263, P. L. 1916, slightly different in arrangement but with the same substance. Section 78 was enacted as sec. 114 of ch. 1 (2nd Special Session), P. L. 1903 (the general school act). Its predecessor was a provision in section 65 of the School Act Revision of 1867, ch. 179, P. L. 1867, as follows:

"It shall not be lawful for any teacher, trustee, or trustees, to introduce into or have performed in any school receiving its proportion of the public money, any religious service, ceremony or forms whatsoever, except reading the Bible and repeating the Lord's Prayer."

That provision was retained in sec. 65 of the Revision of 1867, (Rev. 1877 p. 1081, sec. 65), and in the amendatory Supplement of 1894 (ch. 102, P. L. 1894, Plac. 220, p. 3052 Gen. Stat. 1895).

Considered with the statute was the directive issued by the defendant Board of Education of the Borough of Hawthorne that "any student may be excused during the reading of the Bible upon request". There was no request that a student be excused. The public schools which provide the occasion for the controversy are supported in part by public funds contributed by the state to the school district for educational purposes and in part by funds raised exclusively in the school district by levy upon taxable property within the school district. There were no disputed facts. On cross motions for summary judgment on the pleading judgment went for the defendants, based on a holding that the statutory proceedings do not contravene the First or

the Fourteenth Amendment of the United States Constitution.

Appellants present this line of reasoning: The principle of the separation of the church and state is established in the constitution of the United States, namely, the first and fourteenth amendments which prohibit the intermingling of religious and secular education in the public schools; the reading of the Bible and the reciting of the Lord's Prayer in the public schools are religious services, religious exercises and religious instruction; they are of themselves in aid of one or more religions and in preference of one religion over another; and therefore those acts are contrary to the named constitutional provision. The gist of the argument is that compliance with the statute necessarily involves sectarian worship and sectarian instructions and therefore violates the Federal Constitution.

The effective parts of the First and Fourteenth Amendments are these:

I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

XIV. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The pertinency of the Fourteenth Amendment is that it carried over to the states the prohibition imposed by the First Amendment upon Congress against impairing religious rights of individuals. Therefore our question is whether the New Jersey statute violates the injunction which the first amendment lays against making a law respecting an establishment of religion or preventing the free exercise thereof.

No one is before us asserting that his religious practices have been interferred with or that his right to worship in accordance with the dictates of his conscience has been suppressed. No religious sect is a party to the cause. No representative of, or spokesman for, a religious body has attacked the statute here or below. One of the plaintiffs is "a citizen and taxpayer"; the only interest he asserts is just that and in those words, set forth in the complaint and not followed by specification or proof. It is conceded that he is a citizen and a taxpayer, but it is not charged and it is neither conceded nor proved that the brief interruption in the day's schooling caused by compliance with the statute adds cost to the school expenses or varies by more than an incomputable scintilla the economy of the day's work. The other plaintiff, in addition to being a citizen and a taxpayer, has a daughter, aged seventeen, who is a student of the school. Those facts are asserted, but, as in the case of the co-plaintiff, no violated rights are urged. It is not charged that the practice required by the statute conflicts with the convictions of either mother or daughter. Apparently the sole purpose and the only function of plaintiffs is that they shall assume the role of actors so that there may be a suit which will invoke a court ruling upon the constitutionality of the statute. Respondents urge that under the circumstances the question is moot as to the plaintiffs-appellants and that our declaratory judgment statute may not properly be used in justification of such a proceeding. *Cf. New Jersey Turnpike Authority vs. Parsons*, 3 N. J. 235; *Massachusetts vs. Mellon*, 262 U. S. 447, at 488, 67 Law. Ed. 1078, at 1085, 43 Sup. Ct. 597 (1923). The point has substance but we have nevertheless concluded to dispose of the appeal on its merits.

Was it the intent of the First Amendment that the existence of a Supreme Being should be negated and that the governmental recognition of God should be suppressed? Not that, surely. The temper of the times during which the agitation for and the accomplishment of the amendment was had, the events which led to the adoption of the amendment, the contemporaneous and subsequent interpretation by way of statute and public practice, the very wording of the amendment, all forcefully support that answer.



Instances could be multiplied going to the undeniable result that the Constitution itself assumes as an unquestioned fact the existence and authority of God and that preceding, contemporaneously with and after the adoption of the constitutional amendment all branches of the government followed a course of official conduct which openly accepts the existence of God as Creator and Ruler of the Universe; a course of conduct that has been accepted as not in conflict with the constitutional mandate.

The United States Constitution in Article I, section 7 provides that the President shall have ten days (Sundays excepted) within which to determine whether he will affirm or veto a bill. The essential idea of an oath seems to be that it is a recognition of God's authority and an undertaking by the affiant to accomplish the transaction to which it refers as required by His laws. *Bouvier's Law Dictionary*. The constitution recognized that divine authority by directing that in the alternative an oath or an affirmation be taken in certain instances. With particularity it framed the oath, or affirmation, to be taken by the president. The origin of the privilege, in the alternative, to affirm rather than to take an oath is not to understood, necessarily, as a concession to disbelief in God. The privilege was accorded, or at least made more generous, in New Jersey, in 1727 because the Quakers, although a God-fearing group, were conscientiously scrupulous against taking an oath. See Allinson's Laws, (New Jersey, 1776), page 75.

The first ten amendments, called the Bill of Rights, were offered and adopted speedily after the adoption of the constitution and were a product of the motives and conditions which calminated in the parent instrument. The confederated colonies and, later, the states organized as a constitutional nation, acknowledged the existence of and bowed before the Supreme Being. The Declaration of Independence, phrased in the political ideology of Thomas Jefferson, frankly grounded its position in the unalienable rights endowed by God, the Creator, made appeal to Him, the Supreme Judge of the world for the rectitude of that position and expressed trust in the Divine Providence for protection in the fulfillment thereof. The articles of confederation

recited the beneficent intervention of the Great Governor of the world.

Contemporary construction of a constitutional provision which has been followed since the founding of our government is entitled to the greatest respect. *Ex Parte Richard Quirin*, 317 U. S. 1, 41, 87 Law Ed. 3, 20, 63 Sup. Ct. 2 (1942). *State vs. Wrightson*, 56 N.J.L. 126, 206 (Sup. Ct. 1893). Specifically, Acts by the First Congress, which proposed the first ten amendments, have been judicially considered as of the highest authority in providing a contemporaneous exposition of constitutional provisions. *Patterson vs. United States*, 281 U. S. 276, 300, 74 Law Ed. 854, 864, 50 Sup. Ct. 253 (1939); *Myers vs. United States*, 272 U. S. 52, 174, 71 Law Ed. 160, 189, 47 Sup. Ct. 21 (1926). On September 24, 1789, the day the first Congress adopted the resolution submitting the First Amendment to the states, it adopted a resolution requesting the president to recommend to the people "a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity to establish a Constitution of government for their safety and happiness." Benton, T. H. (Ed.), *Annals of Congress*, Abridged by J. C. Rivers (New York, D. Appleton-Century Co., 1858), Vol. I, pp. 914-915. That Congress also adopted a resolution providing for a chaplain for each house (*id.* p. 932); and every session of congress, from that time forward, has been convened with prayer.

Courts have functioned normally since before our national history began upon the assumption of the sanctity of an oath. Public officers uniformly qualify by being sworn. The statute (Tit. 28 § 453, U.S.C.A.) upon the taking of an oath by the justices and judges of the United States courts is illustrative:

"Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: 'I, \_\_\_\_\_ do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and

impartially discharge and perform all the duties incumbent upon me as — according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God."

The Thanksgiving Proclamation issued annually by the president, founded originally in resolution and continued through the years by tradition, gives, by its continuity and content, a striking reflection of the acceptance by our nation, and specifically by our government, of the idea and the existence of God. Our coined dollar for years beyond memory has carried the inscription "In God We Trust". It seems, *McCullum vs. Board of Education*, 333 U. S. 203, 254, 92 Law. Ed. 649, 680, (dissenting opinion of Mr. Justice Reed) that not only does Congress still have in each house a chaplain who daily invokes divine blessings and guidance for the proceedings but that the armed forces have had commissioned chaplains from early days and that these chaplains, so commissioned, conduct public services in accordance with the liturgical requirements of their several faiths; and that chaplains are attached to each of the schools, governmentally supported and controlled, for the training of military and naval cadets. The United States Congress has enacted (Sec. 1464 New Title 18 Crimes and Criminal Procedure Act of June 25, 1948, U. S. C. A.) that "whoever utters any . . . profane language by means of radio communication shall be fined not more than \$10,000.00 or imprisoned not more than two years, or both". In our national anthem we reverently sing:

" . . . May the heav'n rescued land  
Praise the Power that hath made and preserved us a  
nation,  
Then conquer we must, when our cause it is just  
And this be our motto—"In God is our trust."

What has been said of the federal government could almost be repeated, *mutatis mutandis*, with reference to our state. For illustration: with respect to blasphemy, our own statute, R.S. 2:165-2, provides that any person who



shall willfully blaspheme the name of God shall be guilty of a misdemeanor. An early statute, III Anne, 1704, Allinson p. 3, punished, *inter alia*, "cursing" and "swearing". But the Crimes Act of March 18, 1796, Paterson's Laws, page 211, provided in section 20 the statutory cast that has come down through the various revisions without great change. Elmer's Digest (1838) p. 105, sec. 20. Nixon's Digest (1868) p. 195, sec. 22. Revised Statutes 1874, p. 144, sec. 66. Rev. 1877, p. 238, sec. 66, ch. 235, sec. 73, P. L. 1898, 2 C.S. p. 1770 § 73. Property used for religious purposes has long been and is largely exempt from taxation. Pamph. Laws 1851, p. 272; ch. 372, sec. 1, Pamph. Laws 1931; N. J. S. A. 54:4-3.6. Beyond that it may suffice for the purpose of showing our governmental attitude to refer to a persistent and specific recognition of "Almighty God" in the several constitutions of our state. The first constitution, adopted July 2nd, 1776, provided (Art. XVIII) that "No person shall ever within this colony be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience; nor under any pretense whatsoever compelled to attend any place of worship, contrary to his own faith and judgment". The second constitution, effective September 2nd, 1844, contained this preamble:

"We, the people of the State of New Jersey, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations, do ordain and establish this Constitution:"

It also repeated, in Art. I, par. 3, the language quoted *supra* (except the words "ever within this colony") from the first constitution. In both respects our present constitution, adopted in 1947, follows the 1844 instrument.

The United States Supreme Court, speaking through Mr. Justice Brewer in *Church of the Holy Trinity vs. United States*, 143 U. S. 457, 36 Law. Ed. 226, 12 Sup. Ct. 511 (1892), found no dissonance in the provision of the first amendment and various official declarations placing God

at the apex of all things and said: "There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations, of private persons; they are organic utterances; they speak the voice of the entire people."

Appellants rely mainly on the decisions in the United States Supreme Court in *Everson vs. Board of Education*, 330 U. S. 1, 91 Law. Ed. 711 (1947), and *McCollum vs. Board of Education*, *supra*, (1948).

In the *Everson* case a New Jersey statute authorized the local school district to make rules and contracts for the transportation of children to and from schools. A local school board, pursuant to the statute, authorized reimbursements to parents of money expended by them for the bus transportation of their children on regularly operated buses. A part of the money was for the payment of transportation of children to Catholic parochial schools. A taxpayer challenged the right of the board to reimburse parents of parochial school students and contended that the resolution violated both the State and the Federal Constitutions. The highest court of this state held (133 N. J. L. 350) that neither the statute nor the resolution was in conflict with either the State Constitution or the Federal Constitution. On appeal the United States Supreme Court decided that the statute and the resolution did not violate either the due process clause of the Fourteenth Amendment or the provision of the First Amendment that no law shall be made "respecting an establishment of religion".

A decision holding that a state may use tax moneys to transport children to a parochial school without violating the constitutional provision against an establishment of religion is not, we conceive, an effective holding against the constitutionality of a state statute directing the reading without comment of a few Bible verses in a classroom. The issues are quite different. And the reasoning of the opinion does not, we think, have the pertinency for which appellants argue.

In the *McCullum* case the facts are shortly stated in a summary prefixed to the case as reported in 92 Law. Ed. 649, as follows: "A local board of education in Illinois agreed to the giving of religious instruction in the schools under a 'released time' arrangement whereby pupils whose parents signed 'request cards' were permitted to attend religious-instruction classes conducted during regular school hours in the school building by outside teachers furnished by a religious council representing the various faiths, subject to the approval and supervision of the superintendent of schools. Attendance records were kept and reported to the school authorities in same way as for other classes; and pupils not attending the religious instruction classes were required to continue their regular secular studies." The court held that the facts showed the use of tax-supported property for religious instruction and a close cooperation between the school authorities and the religious council in promoting religious education, and, further, that the tax-supported public school buildings were used for the dissemination of religious doctrines and the state afforded sectarian groups invaluable aid in that it helped to provide pupils for their religious classes through use of the state's compulsory public school machinery. Legally the court found that the arrangement was not a separation of church and state and therefore was in violation of the First Amendment. The facts are, upon their face, so different from ours that no discussion of them seems to be necessary. The outstanding feature of that case was that school property was being used for sectarian instruction and the correlated fact in the present case is that there was no sectarian act.

Appellants contend that the statutory direction provides for religious instruction and religious worship and is in aid of one or more religions and in preference of one religion over another; and it is upon that argument that they seek support in the *Everson* and *McCullum* decisions. No charge is made that, in the reading, passages were selected with the purpose of the result of giving a sectarian bias; the Bible itself is indicted as sectarian. We are

of the opinion that the characterizations of the statute and of the Book are not sound, that the holdings in the cited cases involve essential elements wholly lacking in the instant case, and that consequently the decisions are not in point and are not binding. Further, we think that the reasoning followed in reaching those decisions was not intended to, and does not, reach the facts of the present case.

Appellants concede that there are twelve states which prescribe the reading of the Bible in public school classes: Alabama, Arkansas, Delaware, Florida, Georgia, Idaho, Kentucky, Maine, Massachusetts, Pennsylvania, Tennessee and New Jersey; and that the statutes of five other states make its use permissive: Indiana, Iowa, Kansas, North Dakota and Oklahoma; and also that the cases on the subject which sustain the reading of the Bible (among them decisions by the courts of Texas, Colorado, Michigan, Minnesota and New York) outnumber the cases in which Bible reading was interdicted. It could be added that a bylaw of the Board of Education (Bylaws, Dist. of Columbia Board of Education, chap. 6, sec. 4) requires the reading of the Bible and the Lord's Prayer in the public schools of the District of Columbia; that a Mississippi statute (Mississippi Code, 1942, Title 24, sec. 6672) requires a course in the Principles of Morality and Good Manners, the same to include "the mosaic ten commandments"; and that the Bible is read in a large number of schools in many states where the statutes are silent on the subject.

Appellants further state that the reading of the Bible in the public schools has been struck down in Illinois, Louisiana, Wisconsin and Ohio; and that while decisions upholding the reading of the Bible are more numerous, the better reasoning, "considered in the light of the United States Supreme Court decisions in the *Everson* and *McCullum* cases", leads inevitably to the conclusion of unconstitutionality. We have given our reasons for believing that the last named Supreme Court decisions do not lead to or lean toward that conclusion; and we are not impressed by the alleged pertinency of the state decisions cited by appellants. *Finger vs. Weedman*, 226 N. W. 348 (S. Dakota



Sap. Ct. 1929), while adverse to Bible reading in the schools does not appear to have held the state statute unconstitutional and said that the public schools could, without opposition, "teach that there is an All-Wise Creator to whom we owe love, reverence, and obedience". The Ohio case of *Board of Education vs. Minor*, 23 Ohio St. 211 (1872) was to the effect that inasmuch as the constitution of the state did not enjoin or require religious instruction or the reading of religious books in the public schools the court had no rightful authority to command the boards of education as to what instruction shall be given or what books should be read. The Wisconsin case of *State ex rel Weiss vs. District Board of Education*, 76 Wis. 177, 7 L. R. A. 330 (Wisconsin Sup. Ct. 1890), arose on a petition to compel the reading of the Bible, and the holding was that the state constitution forbade the practice. *Ring vs. Board of Education*, 245 Ill. 334, 92 N. E. 251 (Illinois Sup. Ct. 1910), held that the First Amendment to the Federal Constitution left the states free to enact such laws as they might deem proper with respect to religion, restrained only by limitations of the respective state constitutions, but that the reading of the Bible, the singing of hymns and the repeating of the Lord's Prayer were in violation of the provisions of the constitution of the State of Illinois. In *Herold vs. Parish Board*, 136 La. 1034, 68 So. 116, L. R. A. (N. S.) 1915D 941 (Louisiana Sup. Ct. 1915), the headnotes, drawn by the judge who wrote the opinion, stated that the reading of the Bible, including the Old and New Testaments, in the public schools, was a preference given to Christians and a discrimination made against Jews and therefore was a violation of the constitution of the State of Louisiana. The opinion mentioned the First Amendment of the Federal Constitution, but it is evident that (1) the holding was not on that provision and (2) that the holding turned largely upon the inclusion of the New Testament in the school exercises there under review. Those cases are appellants' chief reliance in that branch of their argument which goes to the position of states adverse to Bible reading.

Cooley (Constitutional Limitations, Eighth Edition, Vol. 2, p. 966) lists five things which are not lawful under and of the American constitutions namely, (1) any law respecting an establishment of religion, (2) compulsory support, by taxation or otherwise, of religious instruction, (3) compulsory attendance upon religious worship, (4) restraints upon the free exercise of religion according to the dictates of the conscience; (5) restraints upon the expression of religious belief. But he adds (p. 974): "while thus careful to establish, protect, and defend religious freedom and equality, the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper infinite and dependent beings. Whatever may be the shades of religious belief all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the Great Governor of the Universe, and of acknowledging with thanksgiving His boundless favors, of bowing in contrition when visited with the penalties of His broken laws".

We consider that the Old Testament, because of its antiquity, its content and its wide acceptance, is not a sectarian book when read without comment. Cf. *Vidal vs. Girard's Executors*, 2 Howard 127, 200, 11 Law. Ed. 205, 235, (1844); *Hackett vs. Brooksville Graded School District*, 120 Ky. 608, 87 S. W. 792, 69 L. R. A. (Kentucky Court of Appeals 1905). It is accepted by three great religions, the Jewish, the Roman Catholic and the Protestant, and at least in part, by others. There are different versions, but the statute makes no distinction. The adherents of these religions constitute the great bulk of our population. There are religious groups other than the Jewish, the Roman Catholic and the Protestant but in this country they are numerically small and in point of impact upon our national life, negligible. This is not a criticism, simply the statement of a fact from which it is to be gathered that the tenets of these minor groups had no vital part in the formation of our national character.

And it is not to say that because a religious group is small, it thereby loses its constitutional rights or that it is not entitled to the protection of those rights. The application is that some of our national incidents are developments from the almost universal belief in God which so strongly shaped and nurtured our people during the colonial period and the formative years of our constitutional government, with the result that we accept as a commendable part of our public life certain conditions and practices which in a country of different origins would be rejected; just as some acts would be offensive here which, as Cooley (supra, p. 975) says, "In a Mahometan or Pagan country might be passed by without notice, or even be regarded as meritorious". Again, take the instance of an atheist: he has all the protection of the constitution; he may not be held to any religious function or to the support, financial or otherwise, of a religious establishment; he may entertain his belief or the lack of belief as he will; but he lives in a country where theism is in the warp and woof of the social and the governmental fabric and he has no authority to eradicate from governmental activities every vestige of the existence of God. He could not, we hypothesize; prevent, on constitutional grounds, the houses of Congress from opening their sessions with prayer to the Almighty for guidance in their deliberations, even though he were a member of Congress, or from maintaining chaplains for service with the armed forces, even though he were a member of those forces. Cf. *Lewis vs. Board of Education*, 157 Misc. 520, 285 N. Y. Supp. 164 (1935), modified 247 App. Div. 106, 286 N. Y. Supp. 174; rehearing denied, 247 App. Div. 873, 288 N. Y. Supp. 751; appeal dismissed 276 N. Y. 490, 12 N. E. 2d 172 (N. Y. Ct. of Appeals 1937). A situation so supposed would be more exposed than our own to a charge of sectarianism because the argument might point to the sectarian affiliations of the clergyman or the chaplain. We are speaking in terms of the constitution upon the situations which that document was intended to reach, specifically upon whether or not the inhibition against the making of a law respecting an establishment of religion or prohibiting the free exercise thereof is violated by the reading, without com-

ment, of a few verses, daily, in our public schools, from the Old Testament, and upon whether a statute which requires that to be done sets up religious instruction, or religious worship, which, within the meaning of our cases, is in aid of one or more religions, or prefers one religion above another. The reading does not, obviously, effect or tend to effect the setting up, or the establishment, of a religion and, just as obviously, it does not prohibit the free exercise of any religion. We have noted the absence of allegation or proof that the plaintiffs or either of them are harmed by the statute of which they complain and we have withheld from considering a disposal of the case upon that technical ground; but we should, and do, recall that no burden of participation is put upon a pupil by the statute, and that by the regulation of the school board under whose jurisdiction the issue arose a pupil would, upon request, be excused from the classroom during the brief exercises. The contention that one religion is preferred above another is vague and intangible; no religious group is a party to the cause; no person or sect is charging that ~~its~~ or its beliefs are prejudiced. The incidents which were condemned in the McCollum case as being contrary to the separation of church and state appear to be entirely absent.

As to the permissive repeating of the Lord's Prayer: That short supplication to the Divinity was given its name because it was enjoined by Christ as an appropriate form of prayer. It is used by Roman Catholics and Protestants with slight variations. But nothing therein is called to our attention as not proper to come from the lips of any believer in God, His fatherhood, and His supreme power. Christ was a Jew and He was speaking to Jews; and it is said, on excellent Jewish authority, (Dr. Philip Bernstein, Rabbi of the Temple B'reth Kodesh, Rochester, N. Y., "What the Jews Believe", Life Magazine September 14, 1950, p. 161), that the prayer was based upon the ancient Jewish prayer called "The Kaddish" - "Exalted and hallowed be the name of God throughout the world \* \* \* May His Kingdom come, His will be done". We find nothing in the Lord's Prayer that is controversial,



ritualistic or dogmatic. It is a prayer to "God, our Father". It does not contain Christ's name and makes no reference to Him. It is, in our opinion, in the same position as is the Bible-reading and needs no special comment beyond what has just been said. Cf. *Church vs. Bullock*, 109 S. W. 115, 16 L. R. A. (N. S.) 860 (Texas Supreme Ct. 1908).

While it is necessary that there be a separation between church and state, it is not necessary that the state should be stripped of religious sentiment. It may be a tragic experience for this country and for its conception of life, liberty and the pursuit of happiness if our people lose their religious feeling and are left to live their lives without faith. Who can say that those attributes which Thomas Jefferson in his notable document called "unalienable rights" endowed by the Creator may survive a loss of belief in the Creator? The American people are and always have been theistic. Cf. *Church of the Holy Trinity vs. United States*, *supra*. The influence which that force contributed to our origins and the direction which it has given to our progress are beyond calculation. It may be of the highest importance to the nation that the people remain theistic, not that one or another sect or denomination may survive, but that belief in God shall abide. It was, we are led to believe, to that end that the statute was enacted, so that at the beginning of the day the children should pause to hear a few words from the wisdom of the ages and to bow the head in humility before the Supreme Power. No rites, no ceremony, no doctrinal teaching; just a brief moment with eternity. Great results follow from elements which to human perception are small. It may be that the true perspective engendered by that recurring short communion with the eternal forces will be effective to keep our people from permitting government to become a man-made robot which will crush even the constitution itself. Our way of life is on challenge. Organized atheistic society is making a determined drive for supremacy by conquest as well as by infiltration. Recent history has demonstrated that when such a totalitarian power comes into control it exercises a ruthless supremacy over men and ideas, and over such remnants of religious worship as it permits to exist. We

are at a crucial hour in which it may behoove our people to conserve all of the elements which have made our land what it is. Faced with this threat to the continuance of elements deeply imbedded in our national life the adoption of a public policy with respect thereto is a reasonable function to be performed by those on whom responsibility lies. Subject to constitutional limitations, the legislature has exclusive jurisdiction over matters of public policy, *Schenley Products Co. v. Franklin Stores Co.*, 124 N. J. Eq. 100, 105 (E. & A. 1937), *State vs. Donovan*, 129 N. J. L. 478, 486 (Sup. Ct. 1943), and the courts should be very sure of their ground before they restrict that legislative field.

The statute under attack has been on the statute books for 47 years, and the substance of it, that is, the permission to read the Bible and to repeat the Lord's Prayer, for more than eighty years. It is common knowledge that the schools have conducted those exercises throughout such periods. This has been without question until now. As was said in *Legg vs. Passaic County*, 122 N. J. L. 100 (Sup. Ct. 1939), affirmed 123 N. J. L. 263 (E. & A. 1939), "... one of the fundamental policies of our jurisprudence is not to declare unconstitutional a statute which has been in force without any substantial challenge for many years unless its unconstitutionality is obvious." To same effect: *Attorney General vs. McGuinness*, 78 N. J. L. 346, 371 (E. & A. 1909), *Jersey City vs. Kelly*, 134 N. J. L. 239 (E. & A. 1946), *Robertson vs. Baldwin*, 165 U. S. 275, 41 Law. Ed. 715, at 719, 17 Sup. Ct. 326 (1897).

Manifestly, as we have indicated, the disputed statutes do not impinge upon the strict wording of the First Amendment. They do not go to the establishment of religion or against the free exercise thereof. How far the intendment of the amendment goes beyond the literal phrasing thereof has never been determined. But it is clear, we think, that the sense of the amendment does not serve to prohibit government from recognizing the existence and sovereignty of God and that the motives which inspired the amendment and the interpretation given by the several departments of the Federal Government concurrently with and subsequent to the submission and adoption of the amendment are inconsistent with any other conclusion. It is a cardinal

rule in the construction of constitutional and statutory enactments that the provision made by way of remedy shall be studied in the light of the evil against which the remedy was erected. The conditions which gave rise to the First Amendment have been graphically portrayed by Mr. Justice Black in the opinion written by him for the United States Supreme Court in the *Everson* case; a factual background which doubtless ruled the decisions in that case and in the *McCullum* case; and a background to which, as we believe, the facts in the instant case have no real similarity. The lure is to color all things, including fundamental facts, with the philosophy prevailing at the hour of observation; but facts are facts, stark and naked; they do not change. The fact is that the First Amendment does not say, and so far as we are able to determine was not intended to say, that God shall not be acknowledged by our government as God. Our view is that a prohibition which is not in the language of the amendment and which is contrary to the intention of those who framed and adopted the instrument should not now be read into it. We consider that the Old Testament and the Lord's Prayer, pronounced without comment, are not sectarian, and that the short exercise provided by the statute does not constitute sectarian instruction or sectarian worship but is a simple recognition of the Supreme Ruler of the Universe and a deference to His majesty; that since the exercise is not sectarian, no justifiable sectarian advantage or disadvantage flows therefrom; and that, in any event, the presence of a scholar at, and his participation in, that exercise is, under the directive of the Board of Education, voluntary. We conclude that the statutes are not in violation of the Federal Constitution and that the judgment below should be affirmed.

## SUPREME COURT OF NEW JERSEY

Appeal Docket No. 560

Civil Action

On Appeal

DONALD R. DOREMUS, et al;

*Plaintiffs-Appellants,*

vs.

BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, and  
the STATE OF NEW JERSEY,*Defendants-Respondents.*

## MANDATE ON AFFIRMANCE

This cause having been duly argued before this Court by Mr. Heyman Zimel, counsel for the appellants and Mr. Henry F. Schenck, counsel for the respondents, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Law Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court—Law Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

Witness the Honorable Arthur T. Vanderbilt, Chief Justice, at Trenton on the 16th day of October, 1950.

CHARLES K. BARTON,

*Clerk of the Supreme Court.*

A True Copy

CHARLES K. BARTON, *Clerk.*

Filed Oct. 16, 1950.

CHARLES K. BARTON,

*Clerk.*



SUPERIOR COURT OF NEW JERSEY, LAW  
DIVISION, PASSAIC COUNTY.

Civil Action

DONALD R. DOREMUS and ANNA E. KLEIN, Plaintiffs,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, NEW  
JERSEY, and the STATE OF NEW JERSEY, Defendants

Memorandum of Decision

Heyman Zimel, Esq., Attorney for plaintiffs.

Alexander E. Fasoli, Esq., attorney for defendants,  
Board of Education of the Borough of Hawthorne, New  
Jersey.

Theodore D. Parsons, Esq., Attorney General of New  
Jersey, attorney for defendant, State of New Jersey.

Parker, McCay & Criscuola, Esqs., attorneys for State  
Council of The Junior Order of United American Mechanics  
of the State of New Jersey, as *amicus curiae*.

This action seeks to test the constitutionality of the provisions of the Laws of New Jersey with respect to religious services or exercises in the public schools of the state, and is presented for determination upon cross-motions for summary judgment on the pleadings. The statutes under attack are N. J. S. A. 18:14-77:

"Reading Bible at opening of school.

"At least five verses taken from that portion of the Holy Bible known as the Old Testament shall be read, or caused to be read, without comment, in each public school classroom, in the presence of the pupils therein assembled, by the teacher in charge, at the opening of school upon every school day, unless there is a general assemblage of the classes at the opening of the school on any school day, in which event the reading shall be done, or caused to be done, by the principal or teacher in charge of the assemblage and in the presence of the classes so assembled."

and N. J. S. A. 18:14-78:

“Religious services or exercises.

“No religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools.”

Plaintiffs shortly contend that compliance with the statutes constitutes religious education and services in aid of one or more religions and in preference of one or more religions over others, and in that public funds and taxes are authorized to support religious activities and institutions and for the purpose of teaching and practicing religion, and so contravenes the First and Fourteenth Amendments to the Constitution of the United States, which read as follows:

#### “Article I

“Right of Conscience, Freedom of the Press, &c.

“Congress shall make no law respecting and establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

#### “Article XIV

“Citizens and Their Rights

#### “Section I

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

The facts are not in dispute. Plaintiff Doremus is a citizen and taxpayer of the Township of Rutherford, New Jersey, and plaintiff Klein is a citizen and taxpayer of the Borough of Hawthorne, New Jersey and the mother of Gloria Klein, a student in the Hawthorne High School, which is a public school operated by the Board of Education and supported by public funds appropriated by the state and by said borough. Defendant Board of Education is complying with the laws and, although rules promulgated and directives issued by it permit any student to be excused from the classroom upon request when the Bible is read or the Lord's Prayer recited, no such request has ever been made by plaintiff Klein or her daughter. The matter, therefore, is submitted to the Court solely on the question of constitutionality, and appears to be of novel impression.

Although there is a diversity of opinion in the State courts as to statutes specifically permitting or requiring the Bible to be read in public schools, the great weight of authority generally seems to hold that such statutes do not contravene the provisions of the several State Constitutions.

That we are fundamentally a religious people is beyond dispute. An excellent review of the American organic utterances which speak the voice of the entire people, and which affirm and reaffirm that this is a religious nation, appears in *Church of the Holy Trinity v. United States*, 143 U. S. 457, wherein the Court said:

"But beyond all these matters no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation. The commission to Christopher Columbus, prior to his sail westward, is from 'Ferdinand and Isabella, by the grace of God, King and Queen of Castile,' etc., and recites that 'it is hoped that by God's assistance some of the continents and islands in the ocean will be discovered,' etc. The first colonial grant,



that made to Sir Walter Raleigh in 1584, was from 'Elizabeth, by the grace of God, of England, France and Ireland, queen, defender of the faith,' etc.; and the grant authorizing him to enact statutes for the government of the proposed colony provided that 'they be not against the true Christian faith nowè professed in the Church of England.' The first charter of Virginia, granted by King James I in 1606, after reciting the application of certain parties for a charter, commenced the grant in these words: 'We, greatly commending, and graciously acception of, their Desires for the Furtherance of so noble a Work, which may, by the Providence of Almighty God, hereafter tend to the Glory of his Divine Majesty, in propagating of Christian Religion to such people, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God, and may in time bring The Infidels and Savages, living in those parts, to human Civility, and to a settled and quiet Government; DO, by these our Letters-Patents, graciously accept of, and agree to, their humble and well-intended Desires.'

"Language of similar import may be found in the subsequent charters of that colony, from the same king, in 1609 and 1611; and the same is true of the various charters granted to the other colonies. In language more or less emphatic is the establishment of the Christian religion declared to be one of the purposes of the grant. The celebrated compact made by the Pilgrims in the Mayflower, 1620, recites: 'Having undertaken for the Glory of God, and Advancement of the Christian Faith, and the Honour of our King and Country, a Voyage to plant the first Colony in the northern Parts of Virginia; Do by the Presence of God and one another, covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation, and Furtherance of the Ends aforesaid.'

"The fundamental orders of Connecticut, under which a provisional government was instituted in 1638-1639, commence with this declaration: 'Foras-



much as it hath pleased the Almighty God by the wise disposition of his divyne prudence so to Order and dispose of things that we the Inhabitants and Residents of Windsor, Hartford and Wethersfield are now cohabiting and dwelling in and uppon the River of Conectecotte and the Lands thereunto adjoyneing; And well knowing where a people are gathered together the word of God requires that to mayntayne the peace and union of such a people there should be an orderly and decent Government established according to God, to order and dispose of the affayres of the people at all seasons as occasion shall require; doe therefore associate and conjoyne our selves to be as one Publike State or Commonwelth; and doe, for ourselves and our Successors and such as shall be adjoynd to us att any tyme hereafter, enter into Combination and Consideration together, to mayntayne and presearve the liberty and purity of the gospell of our Lord Jesus wch we no prfesse, as also the discipline of the Churches, wch according to the truth of the said gospel is now practised amongst us.

"In the charter of privileges granted by William Penn to the province of Pennsylvania, in 1701, it is recited: 'Because no people can be truly happy, though under the greatest Enjoyment of Civil Liberties, if abridged of the Freedom of their Consciences, as to their Religious Profession and Worship; And Almighty God being the only Lord of Conscience, Father of Lights and Spirits; and the Author as well as Object of all divine knowledge, Faith and Worship, who only doth enlighten the Minds, and Persuade and convince the Understandings of People, I do hereby grant and declare.' etc.

"Coming nearer to the present time, the Declaration of Independence recognizes the presence of the Divine in human affairs in these words: 'We hold these truths to be selfevident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.' 'We, therefore, the

Representatives of the United States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name and by Authority of the good People of these Colonies, solemnly publish and declare,' etc.; 'And for the support of this Declaration, with a firm reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives; our Fortunes, and our sacred Honor.'

"If we examine the constitutions of the various States we find in them a constant recognition of religious obligations. Every constitution of every one of the forty-four States contains language which either directly or by clear implication recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well being of the community. This recognition may be in the preamble, such as is found in the constitution of Illinois, 1870: 'We, the people of the State of Illinois, grateful to Almighty God for the civil, political and religious Liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations,' etc.

"It may be only in the familiar requisition that all officers shall take an oath closing with the declaration 'so help me God.' It may be in clauses like that of the constitution of Indiana, 1816, Article XI, section 4; 'The manner of administering an oath or affirmation shall be such as is most consistent with the conscience of the deponent, and shall be esteemed the most adean appeal to God.' Or in provisions such as are found in Articles 36 and 37 of the Declaration of Rights of the Constitution of Maryland, 1867: 'That as it is the duty of every man to worship God in such manner as he thinks most acceptable to Him, all persons are equally entitled to protection in their religious liberty; wherefore, no person ought, by any law, to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice, un-

less, under the color of religion, he shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others in their natural, civil or religious rights; nor ought any person to be compelled to frequent or maintain or contribute, unless on contract, to maintain any place of worship, or any ministry; nor shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief: Provided He believes in the existence of God, and that, under His dispensation, such person will be held morally accountable for his acts, and be rewarded or punished therefor, either in this world or the world to come. That no religious test ought ever to be required as a qualification for any office of profit or trust in this State other than a declaration of belief in the existence of God; nor shall the legislature prescribe any other oath of office than the oath prescribed by this constitution.' Or like that in Articles 2 and 3, of Part 1st, of the Constitution of Massachusetts, 1780: 'It is the right as well as the duty of all men in society publicly and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the Universe . . . . As the happiness of a people and the good order and preservation of civil government essentially depend upon piety, religion and morality, and as these cannot be generally diffused through a community but by the institution of the public worship of God and of public instructions in piety, religion and morality: Ther fore, to promote their happiness and to secure the good order and preservation of their government, the people of this commonwealth have a right to invest their legislature with power to authorize and require, and the legislature shall, from time to time, authorize and require, the several towns, parishes, precincts and other bodies—politic or religious societies to make suitable provision, at their own expense, for the institution of public Protestant teachers of piety, religion and morality in all cases where such provision shall not be made voluntarily.' Or as in sections 5 and 14 of



Article 7 of the constitution of Mississippi, 1832: 'No person who denies the being of a God, or a future state of rewards and punishments, shall hold any office in the civil department of this State . . . Religion, morality and knowledge being necessary to good government, the preservation of liberty, and the happiness of mankind, schools and the means of education, shall forever be encouraged in this State.' Or by Article 22 of the constitution of Delaware, 1776, which required all officers, besides an oath of allegiance, to make and subscribe the following declaration: 'I, A. B. do profess faith in God the Father, and in Jesus Christ, His only Son, and the Holy Ghost, one God, blessed for evermore; and I do acknowledge the Holy Scriptures of the Old and New Testament to be given by divine inspiration.'

'Even the Constitution of the United States, which is supposed to have little touch upon the private life of the individual, contains in the First Amendment a declaration common to the constitutions of all the States, as follows: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' etc. And also provides in Article 1, section 7, (a provision common to many constitutions,) that the Executive shall have ten days (Sundays excepted) within which to determine whether he will approve or veto a bill.'

'There is no dissonance in this declaration. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. Those are not individual sayings, declarations of private persons: they are organic utterances; they speak the voice of the entire people. While because of a general recognition of this truth the question has seldom been presented to the courts, yet we find that in *Updegraph v. The Commonwealth* 11 S. & R. 394, 400, it was decided that, 'Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania; . . . not Christianity



with an established church, and tithes, and spiritual court; but Christianity with liberty of conscience to all men.' And in the *People v. Ruggles*, 8 Johns. 290, 294, 295, Chancellor Kent, the great commentator on American law, speaking as Chief Justice of the Supreme Court of New York, said: 'The people of this State, in common with the people of this country, profess the general doctrines of Christianity, as the rule of their faith and practice; and to scandalize the author of these doctrines is not only, in a religious point of view, extremely impious, but, even in respect to the obligations due to society, is a gross violation of decency and good order . . . The free, equal and undisturbed enjoyment of religious opinion, whatever it may be, and free and decent discussions on any religious subject, is granted and secured but to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community, is an abuse of that right. Nor are we bound, by any expressions in the Constitution as some have strangely supposed, either not to punish at all, or to punish indiscriminately, the like attacks upon the religion of Mahomet or of the Grand Lama; and for this plain reason, that the case assumes that we are a Christian people, and the morality of the country is deeply ingrafted upon Christianity, and not upon the doctrines or worship of those impostors.' And in the famous case of *Vidal v. Girard's Executors*, 2 How. 127; 198, this court, while sustaining the will of Mr. Girard, with its provision for the creation of a college into which no minister should be permitted to enter, observed: 'It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania.'

"If we pass beyond these matters to a view of American life as expressed by its laws, its business, its customs and its society, we find everywhere a clear recognition of the same truth. Among other matters note the following: The form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative

bodies and most conventions with prayer; the prefatory words of all wills, 'In the name of God, amen;' the laws respecting the observance of the Sabbath, with the general cessation of all secular business, and the closing of the court, legislatures, and other similar public assemblies on that day; the churches and church organizations which abound in every city, town and hamlet; the multitude of charitable organizations existing everywhere under Christian auspices; the gigantic missionary associations, with general support, and aiming to establish Christian missions in every quarter of the globe. These, and many other matters which might be noticed, and a volume of unofficial declarations to the mass of organic utterances: that this is a Christian nation.

This review of the background and environment of the period in which the constitutional language was fashioned and adopted is necessary if we are to determine the spirit and intention of the Congress, which submitted the constitutional amendments to the people, and the intention of the people themselves in adopting them. Clearly, there was never any intention to prohibit non-sectarian recognition of God by the State in public transactions and exercises, and New Jersey has recently reaffirmed that intention, for the Preamble to the State Constitution of 1947 was carried over verbatim from the Constitution of 1844 and reads as follows:

"We, the people of the State of New Jersey, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations, do ordain and establish this Constitution."

Mr. Justice Black, speaking for the Court in *Everson v. Board of Education* (1947), 330 U. S. 1, 168 A. L. R. 1392, 91 L. Ed. 711, 67 S. Ct. 504, held that:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor

the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' *Reynolds v. United States*, *supra* (98 U. S. At 164, 52 L. Ed. 249)."

The First Amendment was intended to prohibit legislation for support of any religious tenets or the modes of worship of any sect, *Davis v. Beason* (1890), 133 U. S. 333, 342, 39 L. Ed. 637, 639, 10 S. Ct. 239, and as Justice Black himself, in the *Everson* case, *supra*, said:

"New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church",

he doubtless construed "religion" as "sectarianism" or "religious tenets."

Evidence of this construction is further demonstrated by the fact that the states aid all religions by exempting church property from taxation and at the same time furnish state paid police and fire protection and all usual governmental services, while the national government has a chaplain for each house of Congress who daily invokes Divine blessing and guidance, and the armed forces have commissioned chaplains from early days. This, too, finds



support in the *Everson Case*, *supra*, for it holds that the purpose of the First Amendment "requires the State to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."

In *Lewis v. Board of Education of the City of New York* (1935), 285 N. Y. Supp. 164, the Court said that:

"Undisguised, the plaintiff's attack is on a belief and trust in God and in any system or policy of teaching which enhances or sustains or countenances or even recognizes that belief and trust. Such belief and trust, however, regardless of one's own belief, has received recognition in state and judicial documents from the earliest days of our Republic . . . liberty for non-believers in God, by denial to believers in a Deity, would be a mock liberty."

As there is no issue of prohibition upon the free exercise of religion, the crux of the sole question presented is whether the directed daily reading, without comment, in public school classrooms of five verses of the Old Testament of the Holy Bible, and the permissive repeating of the Lord's Prayer, in accordance with the New Jersey statutes, constitutes an "establishment of religion" as enjoined by the First Amendment. In other words, does it constitute denominational or sectarian instruction and thus support any religious tenets, or the mode of worship of any sect?

The great weight of authority in the state court holds that the Bible itself is not a sectarian book and can be read in the schools to inculcate fundamental morality. *Vidal v. Girard's Exrs.* (1844, 2 How. 127, 11 L. Ed. 205; *Evans v. Selma Union High School District v. Fresno County*, 193 Cal. 54, 222 P. 801, 802, 31 A. L. R. 1121; *Vollmar v. Stanley* (1937), 81 Colo. 276, 255 P. 610; *Freeman v. Sheve*, 59 L. R. A. 927, 932 (Neb. 1902); *Moore v. Monroe*, 52 Am. Rep. 444 (Iowa 1884); *Nessle v. Hum*, 2 Ohio Dec. 60; *Billard v. Bd. of Education of the City of Topeka*, 2 Ann. Cases 521 (Kan. Sup. Ct. 1904); *Pfeiffer v.*



*Bd. of Education of Detroit*, 49 L.R.A. 536 (Mich. 1898); *Hackett v. Brooksville Graded School District*, 87 S.W. 792, 794, 120 Ky. 608, 69 L.R.A. 592, 117 Am. St. Rep. 599, 9 Ann. Cases 36; *Church v. Bullock* (Tex.) 109 S. W. 115, 16 L. R. A. (N. S.) 860.

Mr. Justice Jackson, concurring in *McCollum v. Board of Education* (III. 1948), 333 U. S. 203-256, said:

"Authorities list 256 separate and substantial religious bodies to exist in the continental United States. Each of them, through the suit of some discontented but unpenalized and untaxed representative, has as good a right as this plaintiff to demand that the courts compel the schools to sift out of their teaching everything inconsistent with its doctrines. If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits.

"While we may and should end such formal and explicit instruction as the Champaign plan and can at all times prohibit teaching of creed and catechism and ceremonial and can forbid forthright proselyting in the schools, I think it remains to be demonstrated whether it is possible, even if desirable, to comply with such demands as plaintiff's completely to isolate and cast out of secular education all that some people may reasonably regard as religious instruction. Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without scriptural themes would be eccentric and incomplete, even from a secular point of view. Yet the inspirational appeal of religion in these guises is often stronger than in forthright sermon. Even such a 'Science' as biology raises the issue between evolu-

tion and creation as an explanation of our presence on this planet. Certainly a course in English literature that omitted the Bible and other powerful uses of our mother tongue for religious ends would be pretty barren. And I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity—both Catholic and Protestant—and other faiths accepted by a large part of the world's peoples. One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.

"But how one can teach, with satisfaction or even with justice to all faiths, such subjects as the story of the Reformation, the Inquisition, or even the New England effort to found 'a Church without a Bishop and a State without a King,' is more than I know."

That the Bible, or any particular edition, has been adopted by one or more denominations as authentic, or by them asserted to be inspired, cannot make it a "sectarian book." The book itself, to be sectarian, must show that it teaches the peculiar dogmas of a sect as such, and not alone that it is so comprehensive as to include them by the partial interpretation of its adherents. Nor is a book sectarian merely because it was edited or compiled by those of a particular sect. It is not the authorship nor mechanical composition of the book nor the use of it, but its contents, that give it its character. The question is not whether the version used is canonical or apocryphal. The King James translation of the Bible, or any edition of the Bible, is not a sectarian book and the reading thereof without comment in the public schools does not constitute sectarian instruction. *Hackett v. Brooksville Graded School Dist. supra.*

If the Bible, particularly the Old Testament, is not a sectarian book, it necessarily follows that a mere reading therefrom, without comment, cannot be called sectarian instruction, and as such, is not in violation of the First or Fourteenth Amendments, even to those persons known as atheists.

Nor is the reading of the Lord's Prayer in the opening exercises of public schools sectarian instruction. *Moore v. Monroe, supra; Billard v. Board of Education, supra; Church v. Bullock, supra; Hackett v. Brooksville Graded School Dist., supra.*

In construing a New Jersey statute in the *Everson case, supra*, the Court held that "We must consider the New Jersey statute in accordance with the foregoing limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the state's constitutional power, even though it approaches the verge of that power."

My conclusion is that a repetition of the Lord's Prayer as a morning exercise, without comment or remark, for the purpose of quieting pupils and preparing them for their daily studies, and a reading from the Old Testament of the Holy Bible, without comment, as the book best adapted from which to teach children and youth the principles of piety, justice, and a sacred regard for truth, love for their country, humanity and a universal benevolence, are certainly not designed to inculcate any particular dogma, creed, belief or mode of worship, and accordingly, the provisions of the New Jersey statutes under review do not contravene the First and Fourteenth Amendments of the United States Constitution.

Defendants' motion for summary judgment will be granted and plaintiffs' motion necessarily denied.

ROBERT H. DAVIDSON, A. J. S. C.

Dated: February 20, 1950.



SEP 7 1951

CHARLES ELMORE CROPLEY  
CLERK

IN THE

# Supreme Court of the United States

No. 9—OCTOBER TERM, 1951

DONALD R. DOREMUS and ANNA E. KLEIN,

*Appellants,*

*vs.*

BOARD OF EDUCATION OF THE BOROUGH OF  
HAWTHORNE and THE STATE OF NEW JERSEY,

*Respondents.*

On Appeal From the Supreme Court of the  
State of New Jersey

## BRIEF FOR APPELLANTS

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## **Opinions Below**

The opinion of the Supreme Court of New Jersey (R22-38) is reported at 5 N. J. 435, 75 A. 2d 880. This opinion affirmed a decision of the Superior Court of New Jersey, Law Division, whose opinion (R7-20) is reported in 7 N. J. Super. 442, 71 A. 2d 732.

## **Jurisdiction**

The judgment and mandate of the Supreme Court of New Jersey was entered on October 16, 1950 (R21). An order allowing appeal to the Supreme Court of the United States was made by Mr. Justice BURTON on January 12, 1951, and filed January 19, 1951 (R38). A Statement as to Jurisdiction having been filed with this Court in accordance with Rule 12, on March 12, 1951, this Court made its order in which further consideration of the question of the jurisdiction of this Court and of the motion to dismiss or affirm was postponed to the hearing of the case on the merits (R43). The jurisdiction of this Court rests on 28 U. S. C. 1257 (2).

## **Statutes Involved**

The statutes involved are Revised Statutes of New Jersey (1937) 18:14-77 and 18:14-78.

R.S. 18:14-77 provides:

"At least five verses taken from that portion of the Holy Bible known as the Old Testament shall be read, or caused to be read, without comment, in each public school classroom, in the presence of the pupils therein assembled, by the teacher in charge, at the opening of school upon every school day, unless there is a general assemblage of the classes

at the opening of the school on any school day; in which event the reading shall be done, or caused to be done, by the principal or teacher in charge of the assemblage and in the presence of the classes so assembled."

R.S. 18:14-78 provides:

"No religious service or exercise, except the reading of the Bible and the repeating of the Lord's prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools."

The First and Fourteenth Amendments to the United States Constitution provide in part:

I. "Congress shall make no law respecting an establishment of religion; or prohibiting the free exercise thereof; \* \* \*"

XIV. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

### Questions Presented

Whether Title 18, Section 14-77 of the Revised Statutes of New Jersey, which requires the daily reading of a portion of the Holy Bible known as the Old Testament in each public school classroom of the state is repugnant to the First and Fourteenth Amendments of the United States Constitution.

Whether Title 18, Section 14-78 of the Revised Statutes of New Jersey, which permits the repeating of the Lord's Prayer and the reading of the Bible in the public schools of the state is repugnant to the First and Fourteenth Amendments of the United States Constitution.

### **Specification of Errors**

Plaintiffs maintain that the Supreme Court of New Jersey erred:

1. In affirming the judgment of the Superior Court of New Jersey, Law Division, which granted the defendants' motion for summary judgment and denied the plaintiffs' motion for summary judgment.

2. In holding and concluding that Title 18, Section 14-77 of the Revised Statutes of New Jersey does not contravene the First Amendment and the Fourteenth Amendment of the United States Constitution.

3. In holding and concluding that Title 18, Section 14-78 of the Revised Statutes of New Jersey is not contrary to the provisions of the First and Fourteenth Amendments of the United States Constitution.

4. In holding and concluding that the Old Testament of the Holy Bible is not a sectarian book and its reading not a religious service or exercise within the prohibition of the establishment of religion clause of the United States Constitution.

5. In holding and concluding that the Lord's Prayer is not sectarian and not a religious service or exercise contrary to the provisions of the First and Fourteenth Amendments of the United States Constitution.



6. In failing to prohibit and restrain the defendants from observing the provisions of the aforesaid statutes and from engaging in the practices therein set forth.

### Statement

Two statutes of the State of New Jersey are involved in this appeal. The first prescribes the daily reading without comment of at least five verses from the Old Testament in every public school classroom in the state; the second excepts from a general provision against religious services or exercises in public schools of the state such reading from the Holy Bible and also the reciting of the Lord's Prayer. The defendants are the State of New Jersey and the Board of Education of the Borough of Hawthorne. Plaintiffs are citizens and taxpayers of the State of New Jersey and the plaintiff Anna Klein is the mother and person standing in *loco parentis* of a student in one of the public schools of the defendant Borough of Hawthorne. Their suit is for a declaratory judgment declaring the statutes unconstitutional under the First and Fourteenth Amendments to the United States Constitution and for an injunction restraining the defendants from engaging in the unconstitutional practices. The existence of the statutes, compliance therewith, the fact that the schools of the Borough of Hawthorne are supported by public funds of the State of New Jersey and of the School District in question are admitted; it was also stipulated that upon request any student might be excused from class during such reading of the Bible and that in this case neither the parents or the child asked to be excused (R5-6). The plaintiffs' standing in Court to pursue the cause of action was also eliminated from consideration; the defendant State of New Jersey raised this question by its second separate and affirmative defense

in its answer (R4) and withdrew it in the pre-trial conference order (R6). The matter came on to be heard in the first instance on countermotions for summary judgment on the pleadings and all formal requirements were waived by both parties (R5), so that the single question before the Court was whether the statutes in question are contrary to the Constitution of the United States. The trial Court decided that they were not unconstitutional, denied plaintiffs' motion for summary judgment, and granted defendants' motion for summary judgment (R6-7). This decision was affirmed by the Supreme Court of New Jersey (R21).

### Summary of Argument

The First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof \* \* \*". Decisions of the Supreme Court of the United States have determined (a) that this provision of the United States Constitution has been made applicable to the states by the Fourteenth Amendment; and (b) that this constitutional provision forbids not only governmental preference of one religion over another, but also impartial governmental assistance of all religions. These constitutional provisions prohibit a state from passing laws which aid one religion, aid all religions, or prefer one religion over another. The statutes of the State of New Jersey here in question, which prescribe regular daily reading in public school classrooms of portions of the Old Testament and which permit the reciting of the Lord's Prayer in such classrooms, utilize the compulsory education machinery of the state to engage in religious services and exercises and thus aid one religion or several religions and prefer one religion over another. The Old Testament

of the Holy Bible is a religious and devotional book which is the basis of the Christian and Jewish religion. Its reading, in the form set forth in the statute, is a religious ritual which constitutes an establishment of religion and an interference with the free exercise thereof. The Lord's Prayer is a sectarian prayer and its reading is a religious exercise and service. There are numerous versions of the Old Testament, each of which is considered the true Word of God by a particular group or sect and repudiated as unauthentic or heretical by others. The reading of any particular version of the Old Testament, the selection of which under the statute is left to the discretion of a particular school board or a particular teacher, is *ipso facto* a preference for the religious group which recognizes that particular version and a discrimination against all other religious groups as well as against the unbelieving. That any student may withdraw from the classroom during such reading, at the whim of the school board, does not render the statute less discriminatory, but is actually evidence that the practice is improper. The religious practices here involved are such an intermingling of religion and government as are clearly repugnant to the First and Fourteenth Amendments of the United States Constitution as definitively interpreted by decisions of this Court. Objections to such practices do not evince a hostility to religion nor are they an attack upon God, upon religion, nor upon the Bible, but are an attempt to preserve the respective functions of government and of religion, each in its own sphere, and to maintain that wall of separation between church and state which is beneficial and essential both to government and religion.

## POINT I

The meaning and intent of the "Establishment of Religion" provision of the First Amendment have been clearly defined by recent decisions of the United States Supreme Court.

The basic American principle of the separation of church and state, crystallized in the First Amendment of the United States Constitution, has received extensive consideration by this Court within the past few years in two important cases: *Everson v. Board of Education*, 330 U. S. 1 (1947) and *McCollum v. Board of Education*, 333 U. S. 203 (1948).—There the Court conclusively defined certain basic principles which can no longer be the subject of controversy. These principles are applicable to the case at bar and it would be an act of supererogation to do more than merely restate these premises here.

First, the Court determined definitively that the restrictions upon Congressional action involved in the First Amendment were made applicable to state action by the Fourteenth Amendment. With respect to the other provisions of the First Amendment the Court had previously decided that the Fourteenth Amendment channeled those provisions to the states. *Gitlow v. New York*, 268 U. S. 652 (1925); *Hamilton v. U. of Calif.*, 293 U. S. 245 (1934); *Minersville v. Gobitis*, 310 U. S. 586 (1940), and *United States v. Ballard*, 322 U. S. 78 (1944). In the *Everson* and *McCollum* cases the Court held that the Fourteenth Amendment made the establishment of religion clause applicable to the states. This holding of this Court is too recent to require reargument here: the point was extensively argued and clearly decided in the *Everson* case; in the *McCollum* case the Court was asked to distinguish or overrule its holding in this respect but refused to do so,



to quote Mr. Justice BLACK, "after giving full consideration to the arguments presented" (at 211).

Secondly, both the *Everson* and *McCullum* cases held that the First Amendment forbids not only governmental preference of one religion over others, but also an impartial governmental assistance of all religions. This extensive scope of the First Amendment was recognized both by the majority and the minority of the Court in the *Everson* case and reiterated in the *McCullum* case. The wide scope of the ban of the First Amendment was summed up in the *Everson* case, and re-affirmed in the *McCullum* case, as follows:

"Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or for professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization or groups, and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' " (*McCullum*, at 210.)

Plaintiffs consider these two points, at least, as definitely established and beyond the necessity of further consideration in this case. In doing so, plaintiffs are not relying merely upon the principle of *stare decisis*,

but upon the premise that the points were strenuously argued and conclusively decided so recently and so firmly that further reargument to reestablish the principles and confirm the logic upon which the Court based its holding would be gratuitous and presumptuous.

## POINT II

**The First Amendment (as applied to the states by the Fourteenth Amendment) bars the intermingling of religious instruction with the compulsory education system of a state.**

The general principles applicable to the case *sub judice* are also clearly set forth in the *McCollum* case. That case too involved "the power of a state to utilize its tax-supported public school system in aid of religious instruction." Involved in that case was the practice of released time for religious instruction. A portion of the school time was allotted for religious instruction by teachers of separate religious groups. During these periods students were relieved of their regular secular studies to participate in the religious classes; those who did not choose to take religious instruction pursued their secular studies during the period. The Court, through Mr. Justice BLACK, found that by this practice, "the operation of the state's compulsory education system thus assists and is integrated with the program of religious sects \* \* \*. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith." (At 209). Mr. Justice FRANKFURTER in his concurring opinion put it succinctly: "Illinois has here authorized the commingling of religious with secular instruction in the public schools. The Constitution of the United States forbids this." (At 212).

In his opinion Mr. Justice FRANKFURTER gives the historical background of the application of the principle of separation to the field of education:

"The modern public school derives from a philosophy of freedom reflected in the First Amendment." (at 214)

"Zealous watchfulness against fusion of secular and religious activities by Government itself, through any of its instruments but especially through its educational agencies, was the democratic response of the American community to the particular needs of a young and growing nation, unique in the composition of its people." (at 215)

"The non-sectarian or secular public school was the means of reconciling freedom in general with religious freedom. The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered. Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice." (at 216)

As Mr. Justice JACKSON said in the *Everson* case:

"It (our public school) is organized on the premise that secular education can be isolated from all religious teaching so that the school can incul-

cate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion." (at 24)

These general principles, at least insofar as they are general principles, are beyond dispute. Their application to the particular situation involved in the instant case will be discussed hereafter, but plaintiffs are certain that defendants will not argue the conclusiveness of the holding in the *Everson* and *McCullum* cases that the public schools cannot be utilized in aid of religious instruction. The Court has so decided and the plaintiffs take the principle for granted.

### POINT III

**This case is not an attack upon God, an attack upon religion, or an attack upon the Bible.**

Plaintiffs make this point, before going into the main argument, in order that the parties to this suit may not argue at cross purposes over matters which are not relevant to the immediate cause concerned. For this purpose, in view of the collateral nature of the reasons advanced by the New Jersey Supreme Court in its decision and of the irrelevant material contained in the briefs by the defendants heretofore filed before the New Jersey Courts, plaintiffs feel that for clarity's sake it might be well to start by stating what this case is not about.

In matters of this nature sincere proponents of one side or another are often afflicted with a species of emotional astigmatism which causes them to confuse the issues and to direct their fire at matters which have no pertinence to the case. In the instant case, the briefs filed by the defendants in the State Court and, in fact, the



decision of the New Jersey Supreme Court, evinces such an emotional reaction. The sacred nature of the Bible, the reverence in which most Americans hold it, and the part that it has played in the education of most individuals, compel them to misconstrue the nature of such a constitutional question as is here involved. The reaction is almost reflex in nature: to ask the courts to strike down such a statute as the New Jersey one which compels the reading of the Bible in public school classrooms is construed as an attack upon religion, a repudiation of God, an assault upon the Bible.

It cannot be repeated too strongly that the present issue is not one between the religious and the godless, between the believer and the atheist. The First Amendment of the Constitution was not written by atheists. As Mr. Justice FRANKFURTER says in the *McCollum* case: "The deep religious feeling of James Madison is stamped upon the Remonstrance." (at 216) The famous Jeffersonian phrase "a wall of separation between church and state," is contained in a letter in which Thomas Jefferson affirmed his belief in God.<sup>1</sup> Nor have the justices of the United States Supreme Court, whose decisions have upheld the great principle of the separation of church and state, done so because of any hostility to religion or any disbelief in God. Mr. Justice BLACK disposed of any such allegation in the *McCollum* case when he said:

"To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would

<sup>1</sup> The Complete Jefferson, Padover, Saul K. (Ed.) (New York: Duell, Sloan & Pearce, 1943), Appendix D, p. 518.

be at war with our national tradition as embodies in the First Amendment's guaranty of the free exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." (at 211)

The Unitarian church, the Baptist church, and the Jewish religious bodies have consistently been opposed to all practices which commingle governmental functions with religious.<sup>2</sup> With respect to the specific practice of Bible reading in public schools, an analysis of the cases which have come before State Courts shows that in almost every case the litigation has been initiated by people of religious persuasion, generally Catholics who objected to the use of the St. James version of the Bible as an infringement of the freedom guaranteed them by the First Amendment.<sup>3</sup>

<sup>2</sup> An eloquent and comprehensive brief against compulsory reading in the public schools was submitted to the 1926 legislature of Virginia, which was considering a bill similar to the New Jersey statute, on behalf of the Baptist General Association of Virginia, by Hon. John Garland Pollard, then Dean of William & Mary College and later Governor of Virginia. This Baptist Memorial is quoted at length in Johnson's "The Legal Status of Church-State Relationships in the United States" (University of Minnesota Press, 1934, pp. 118-126).

A similar stand has been taken for many years by adherents of the Jewish faith. Various resolutions by the Central Conference of American Rabbis against Bible reading in the public schools may be found in Joseph L. Fink: Summary of CCAR Opinion on Church and State as Embodied in Resolutions Adopted at Conferences Through the Years. (Philadelphia: Jewish Publication Society, 1948.) As long ago as 1906 the Central Conference of American Rabbis published a pamphlet on the general subject of "Why the Bible Should Not be Read in the Public Schools" and this pamphlet has been reprinted many times since.

<sup>3</sup> In the following cases the suits were initiated by Catholics: *Donahoe v. Richard*, 38 Me. 376 (Maine, 1854); *Hackett v. Brooksville Grade School*, 120 Ky. 608, 87 S. W. 792 (Kentucky, 1905); *Finger v. Weedman*, 226 N. W. 348 (South Dakota, 1929); *People v. Stanley*, 81 Colo. 276, 255 Pac. 610 (Colorado, 1927); *Ring v. Bd. of Educ.*, 245 Ill. 334, 92 N. E. 251, 29 L. R. A. (N. S.) 442 (Illinois, 1910) and *Weiss v. District Bd.*, 76 Wis. 177, 44 N. W. 967 (Wisconsin, 1890).

The case of *Herold v. Parish Bd.*, 136 La. 1034, 68 So. 116, 56 L. R. A. 1915d, 941 (Louisiana, 1915), was brought by Jews and Catholics.

In the case of *Church v. Bullock*, 109 S. W. 115 (Texas, 1908), two Catholics, two Jews, and one unbeliever joined in initiating the suit.

A close reading of the decision of the New Jersey Supreme Court from which this appeal is taken shows that the major basis for its opinion was that it construed the case as an attack on religion and an attack upon God (R25). Thus construed it is easy for the Court or litigant to discover innumerable instances, statutory, judicial or practical, to prove that the Constitution of the United States does not intend to and has not obliterated recognition of religion and recognition of God. Plaintiffs submit, however, that all of these instances and all of these arguments are beside the point. This case does not attempt to drive religion out of the public consciousness or to create an enforced disbelief in God. It seeks simply to invoke the protection of the First Amendment for the religious as well as the irreligious; it maintains that it is to the benefit of both religion and government to keep their respective functions separate, and that the great truths of the Bible are best taught in the church, in the Sabbath and parochial schools, and by the parents—not in the public schools. There those truths may be explained and enforced, the spiritual welfare of the child guarded and protected, and his spiritual nature directed and cultivated in accordance with the dictates of the parental conscience. The Constitution does not interfere with, but protects, such teaching and such culture. It only banishes sectarian and theological tracts from the schools. It does this not because of any hostility to religion but because the men who adopted the Constitution and the great men since then who have interpreted it believe that the public good would thereby be promoted.<sup>4</sup>

<sup>4</sup> "It is not because religious teaching does not promote the public or the individual's welfare, but because neither is furthered when the state promotes religious education; that the Constitution forbids it to do so. Both legislatures and courts are bound by that distinction." Mr. Justice RUTLEDGE, in dissenting opinion to *Everson* case, at 52.

Religion does not need an alliance with the state to encourage its growth. Its weapons are moral and spiritual and its power is not dependent upon the force of a majority.

"United with government, religion never rises above the merest superstition; united with religion, government never rises above the merest despotism; and all history shows us that the more widely and completely they are separated the better it is for both." *Board of Education v. Minor*, 23 Ohio St. 211, 13 Amer. Rep. 233.

#### POINT IV

**The reading of the Bible and the reciting of the Lord's Prayer in the public schools are religious services and exercises and religious instruction contrary to the First and Fourteenth Amendments of the United States Constitution.**

The precise questions here involved, namely whether required reading of the Bible and permissive reciting of the Lord's Prayer in the public schools of the state are contrary to the First Amendment, have never come before this Court. The nearest approach to consideration by the United States Supreme Court was in the case of *Clitheroe v. Showalter*, 284 U. S. 573 (1931), which arose in the State of Washington. Plaintiff filed a petition with the State Board of Education to force his local Board to require the reading of the Bible in the public schools of the state. (The case is unique in that it is the only case that counsel has been able to find in which an attempt was made to compel the reading of the Bible; in all other cases, the effort was to prevent Bible reading.) The state Board denied the petition on the ground that it raised a constitutional question (under the Constitution of the State of



Washington) upon which the Board had no jurisdiction, whereupon the petitioner asked the Supreme Court of Washington to issue a writ of mandamus requiring the Board to grant the petition. The state Supreme Court denied the issuance of the writ (159 Wash. 519, 293 Pac. 1000 [1930]), and the subsequent appeal to the United States Supreme Court was dismissed for lack of a substantial Federal question.

The question has come before numerous state Courts on various occasions. Eleven states, in addition to New Jersey, prescribe the reading of the Bible in public school classes.<sup>5</sup> Five other states make its use permissive.<sup>6</sup> No state requires the repeating of the Lord's Prayer and in only two other states besides New Jersey is it specifically permitted by statute.<sup>7</sup>

The statutes requiring the Bible to be read daily vary somewhat in details: e.g., Alabama requires "reading from the Holy Bible," not specifying the Old Testament; Delaware, like New Jersey, requires five verses; Pennsylvania requires the reading of at least ten verses; Georgia

<sup>5</sup> Code of Alabama, 1940, Title 52, sec. 542; Digest of the Statutes of Arkansas, 1937, Vol. I, sec. 3614; Revised Code of Delaware, 1935, Ch. 71, sec. 2758; Florida Statutes Annotated, 1943, Title XV, sec. 231.09; Code of Georgia Annotated, Title 32, sec. 705; Idaho Code Annotated, 1932, Vol. 2, Title 32, sec. 2205 *et seq.*; Kentucky Revised Statutes, 1944, Title XIII, secs. 158.170, 158.990; Revised Statutes of Maine, 1944, Vol. I, Ch. 37, sec. 127; Annotated Laws of Massachusetts, 1932, Vol. 2, Title XII, Ch. 71, sec. 31; Purdon's Pennsylvania Statutes Annotated, Title 24, sec. 1555; William's Tennessee Code Annotated, 1930, Vol. 2, Title 7, sec. 2343(4). Mississippi might be included in this list since its law requires instruction in the Ten Commandments. Mississippi Code, 1942, Title 24, sec. 6672.

<sup>6</sup> Burn's Indiana Statutes Annotated, 1933, Vol. 6, Title 28, sec. 5101; Iowa Code, 1939, Title XII, sec. 4258; General Statutes of Kansas, 1935, Ch. 72, secs. 1722, 1819; North Dakota Revised Code of 1943, Title 15, sec. 3812; Oklahoma Statutes Annotated, Title 70, sec. 495. South Dakota also permitted Bible-reading until 1931 when its law was revised to delete this provision. South Dakota Code of 1929, Vol. 1, Title 15, sec. 3103.

<sup>7</sup> Revised Code of Delaware, 1935, ch. 71, sec. 2758; Revised Statutes of Maine, 1944, Vol. I, Ch. 37, sec. 127.

requires at least one chapter to be read each day from the Bible, "including the Old and the New Testament." Arkansas, Florida, Kentucky, Maine, Massachusetts, New Jersey and Pennsylvania require that no comment be made. Georgia, Idaho and Tennessee have made statutory provision for excusing pupils during such reading at the request of parents or guardians, while in Kentucky and Massachusetts pupils who have conscientious scruples against the reading of the Bible may be excused from taking any personal part in the reading. The Maine statute provides that the pupils must give respectful attention.

In the state Courts, it is readily admitted, the cases which have sustained the reading of the Bible in the public schools exceed, numerically, those in which Bible reading has been interdicted. Bible reading has been upheld in Maine, Massachusetts, Kentucky, Georgia, Kansas, Iowa, Texas, Colorado, Michigan, Minnesota, and New York.

On the other hand, the reading of the Bible in the public schools has been struck down in Illinois, Louisiana, Wisconsin, and Ohio.<sup>9</sup>

<sup>9</sup> (National Education Association Research Bulletin, Vol. XXIV, No. 1, Feb. 1946, p. 26.)

<sup>9</sup> *Donahoe v. Richard*, 38 Me. 376 (1854); *Spiller v. Woburn*, 94 Mass. 127 (1866); *Hackett v. Brooksville Graded School District*, 120 Ky. 608, 87 S. W. 792 (1905); *Wilkinson v. City of Rome*, 152 Ga. 763, 20 A. L. R. 1535 (1921); *Billard v. Board of Education of Topeka*, 69 Kans. 53 (1904); *Moore v. Monroe*, 64 Ia. 367, 20 N. W. 475 (1884); *Church v. Bullock*, 190 S. W. 115 (1908); *People v. Stanley*, 81 Colo. 276, 255 Pac. 610 (1927); *Pfeiffer v. Board of Education of Detroit*, 118 Mich. 560 (1898); *Kaplan v. Independent School District* (Minn.), 214 N. W. 18 (1927) and *Lewis v. Board of Education*, 151 Misc. 520, 28 N. Y. S. 164 (1935).

<sup>10</sup> *Ring v. Board of Education*, 245 Ill. 334, 92 N. E. 251, 29 L. R. A. (N. S.) 442 (1910); *Herold v. Parish Board*, 136 La. 1034, 68 So. 116, 56 L. R. A. 1915d, 941c (1915); *Weiss v. District Board*, 76 Wis. 177, 44 N. W. 967 (1890); *Board of Education v. Minor*, 23 Ohio St. 211, 13 Amer. Rep. 233.

In two other well-reasoned cases, in South Dakota and Nebraska, no stand was taken on the exact question, but the language of the courts was clearly contrary to such a practice.<sup>11</sup>

The decisions in the state Courts have almost invariably been based upon the provisions of the respective state constitutions and in none of them have the First Amendment and the Fourteenth Amendment of the United States Constitution been precisely and directly invoked.

Accordingly, if the question were to be decided by a majority of those who have thus far voted, if the "weight of authority" were to be determined merely by numbers, the case for permitting Bible reading and the reciting of the Lord's Prayer in the public schools would prevail. An examination, however, of the reasoning in the respective cases, pro and con, considered in the light of the United States Supreme Court's decisions in the *Everson* and *McCullum* cases, leads ineluctably to the conclusion that such practices are unconstitutional.

Among the reasons advanced in support of Bible reading by those courts which have sustained the practice are such arguments as: (1) the Bible is non-sectarian; (2) no harm is done because pupils may be excused; (3) the fact that the Bible is read without comment makes its reading valid; (4) the amount of time spent on such religious exercises is so small as to make it unimportant (the de minimis rule); (5) the reciting of the Lord's Prayer and the reading of the Bible are effective means of quieting the pupils and preparing them for their lessons; and (6) the interesting reason stated by the New Jersey Supreme Court in the opinion from which this

<sup>11</sup> *Finger v. Weedman* (S. D.), 226 N. W. 348 (1929); *Freeman v. Schieve*, 65 Nebr. 853, 91 N. W. 826 (1902).



appeal is taken, to the effect that the Bible is accepted by the three great religions, the Jewish, the Roman Catholic and the Protestant, which constitute "the great bulk of our population" and that other religious groups in this country are "numerically small and, in point of impact on our national life, negligible," (R33) and thus, presumably, not entitled to the protection of the United States Constitution.

Even before one examines the validity of these arguments, they appear, *a priori*, to be evasions and excuses, attempts to minimize, by various devices, a practice which even to the courts which sustain it requires rationalization. Plaintiffs submit that these arguments are both trivial and irrelevant, and in actuality are proof that the reading of the Bible and the reciting of the Lord's Prayer in the public schools are improper, illegal and unconstitutional.

The basic point in the case is that the use of public statutes to compel the regular use of religious tracts in public schools is such an intermingling of the functions of religion and government as is barred by the First and Fourteenth Amendments.

The test set down by the United States Supreme Court in the *Everson* and *McCullum* cases is not a test of sectarianism. This Court has construed the First Amendment to bar not only preferences among religions but equal aid to all religions. It is not the fact that the Bible is a sectarian book (as plaintiffs will show hereafter) that makes its compulsory use in the public schools constitutionally illegal, but the fact that it is a work of intrinsically religious import and ritualistic significance that makes it so. The fact that the Old Testament, in its respective versions, is accepted by a number of religious groups, does not make its use, under the circumstances provided



in the New Jersey statute, a proper exercise of state power under the First Amendment.

None of the cases in the state courts which have permitted the reading of the Bible or the reciting of the Lord's Prayer has denied that they are religious works and services. The courts have only gone so far as to hold that they are not sectarian. Plaintiffs believe that this Court can take judicial notice that they are religious exercises.

In the Protestant, Catholic and Jewish religions the Holy Bible (in each case a different version) is deemed to be the inspired Word of God. The reading of it forms part of all religious services in the Christian or Jewish church. It is as much a part of the religious worship of churches in the land as is the offering of prayer.

There may be some dispute among the several sects as to the sanctity or the accuracy of certain portions of certain versions of the Bible, but all the different sects of Christians agree that the Bible is the inspired Word of God, that the Creator of the universe is its Author, and that it is a book of divine instruction as to the creation of man, his relation to, dependence on, and accountability to God. Although the Bible is considered a great literary work as well as a treasury of historical lore, its predominant character is a pious one. The historical and literary features of the Bible are of great value, but its distinctive feature is its claim to teach a system of religion revealed by direct inspiration from God.

It is true that among the sophisticates of today it has become fashionable to consider the Bible as a great work of literature and to stress its great moral values and its monumental prose while diminishing its religious significance. Plaintiffs submit that if these are the sole reasons that the proponents of Bible reading in the public schools

urge the compulsion of such a statute of the State of New Jersey, they are trivial reasons. It is precisely because the Bible is considered the Word of God that it derives its great value as literature and as a moral tract. The modern English poet and essayist, T. S. Eliot, has stated this clearly and wittily:

"I could easily fulminate for a whole hour against the men of letters who have gone into ecstasies over 'the Bible as literature,' the Bible as 'the noblest monument of English prose.' Those who talk of the Bible as a 'monument of English prose' are merely admiring it as a monument over the grave of Christianity. I must try to avoid the by-paths of my discourse: it is enough to suggest that just as the work of Clarendon, or Gibbon, or Buffon, or Bradley would be of inferior literary value if it were insignificant as history, science and philosophy respectively, so the Bible has had a *literary* influence upon English literature *not* because it has been considered as literature, but because it has been considered as the report of the Word of God. And the fact that men of letters now discuss it as 'literature' probably indicates the *end* of its 'literary' influence."<sup>12</sup>

Any question as to whether the reading of the Bible or the repeating of the Lord's Prayer are religious services or exercises is resolved by the very language of New Jersey Revised Statutes 18:14-78, which prohibits any "religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer \* \* \*." The New Jersey Legislature has clearly shown here that it considers the reading of the Bible and the repeating of the Lord's Prayer "religious services or exercises."

The reading of the Bible and the reciting of the Lord's Prayer in the classrooms, therefore, constitutes religious

<sup>12</sup> Eliot: Essays Ancient and Modern: Religion and Literature.



instruction and religious worship and come within the interdiction of the Constitution. Plaintiffs will show that they are also sectarian, but whether or not they are sectarian they are religious exercises and, therefore, unconstitutional.

"The reading of the Bible in school is instruction. Religious instruction is the object of such reading, but whether it is so or not, religious instruction is accomplished by it." *Ring v. Board of Education*, 245 Ill. 334, 92 N. E. 251 (1910).

The Wisconsin Supreme Court in the case of *Weiss v. District Board*, 76 Wis. 177, 44 N. W. 967 (1890), held:

"That the reading from the Bible in the schools, although unaccompanied by any comment on the part of any teacher is 'instruction' seems to us too clear for argument. Some of the most valuable instruction a person can receive may be derived from reading alone, without any extrinsic aid by way of comment or exposition."

To permit—in fact to require—such religious instruction in the public schools is clearly a case of a state using its secular power to aid religion.<sup>13</sup>

## POINT V

**The reading of the Bible or the repeating of the Lord's Prayer is, *ipso facto*, in aid of one or more religions, and in preference of one religion over another.**

While plaintiffs maintain that religious exercises and readings in the public schools are unconstitutional regardless of whether they are sectarian, and that even if it

<sup>13</sup> "It (the constitutional inhibition) forestalled compulsion by law of the acceptance of any creed or the practice of any form of worship." *Conwell v. Connecticut*, 310 U. S. 296 (1940), at 345.



were possible for such exercises to be completely non-partisan and equable to all religions they would still be constitutionally improper, it is additionally clear that both the Bible and the Lord's Prayer are sectarian. Thus their use in the public schools is not only in aid of certain religions but in preference of one or more religions over others.

That the reading of the Old Testament is a preference for the Christian and the Jewish religions over all other religious sects, as well as over the free thinker, is too obvious to require argument. As the Illinois Supreme Court said in the *Ring* case, *supra*:

"The importance of most religious opinions and differences is for their own and not for a court's determination. With such differences, whether important or unimportant, courts or governments have no right to interfere. It is not a question to be determined by a court in a country of religious freedom what religion or what sect is right. That is not a judicial question. All stand equal before the law—the Protestant, the Catholic, the Mohammedan, the Jew, the Mormon, the Free Thinker, the Atheist. Whatever may be the view of the majority of the people the court has no right and the majority has no right, to force that view upon the minority, however small. It is precisely for the protection of the minority that constitutional limitations exist."

The same Court said:

"One does not enjoy the free exercise of religious worship who is compelled to join in any form of religious worship \* \* \*. The wrong arises not out of the particular version of the Bible \* \* \* but out of the compulsion to join in any form of worship. The free enjoyment of religious worship includes freedom not to worship."

Moreover, because of the various versions of the Bible which are extant, it is impossible in *any* classroom to read *any* version of the Bible without *ipso facto* favoring one particular branch of religion and discriminating against other branches of religion.

The various Protestant sects of Christians favor the King James version, published in London in 1611, while Catholics recognize the Douay version, of which the Old Testament was published in France in 1609. Each one claims for its own the most accurate presentation of the inspired Word. The versions differ in many particulars. There are differences of translation, many of which may seem unimportant to those not particularly concerned, although Catholics claim that there are cases of willful perversion of the Scriptures in the King James translation from which heretical doctrines and inferences have been drawn. Men like Wickliffe, Luther, Tyndale, for their translations of the Scriptures, have been commended and glorified by one sect, and denounced and anathematized by the other. Books containing such translations have been committed to the flames as heretical, and their translators, printers, publishers, and distributors persecuted, imprisoned, tortured, and put to death for participating in their production and distribution.

It is not necessary to go at length into the various differences among the versions of the Bible. A few examples should suffice. For example, the Hebrew Old Testament recognizes only 24 books, rejecting all the later books known as apocryphal; the Protestant or King James version of the Bible includes 39 books; and the Douay version has 45 books, all of which are recognized as the Inspired Word by Catholic Canon.

\* The noted Twenty-Third Psalm is different in different versions of the Bible: in the St. James version it begins,

"The Lord is my shepherd"; in the Catholic version, "The Lord ruleth me"; and in one of the smaller Christian sects it reads, "The Lord is my banker, my credit is good."<sup>14</sup>

The First Commandment differs in the several translations, and in one version of the Bible the Seventh Commandment is the one against the committing of adultery while in another version the Seventh Commandment reads: "Thou shalt not steal."

So far as the Lord's Prayer is concerned there can be no possible question of its sectarianism. To begin with, the Protestants and Catholics differ on the version to be used. To Catholics the concluding clause contained in the St. James version has taken on a Protestant connotation, and the Catholics omit the clause beginning, "For thine is the kingdom, etc."

To Jews the assertion that the Lord's Prayer is non-sectarian is an absurdity, for the context in which the Lord's Prayer is presented in the New Testament reveals it to be a prayer offered as avowedly contrary to Jewish practices. A reference to the several verses preceding the Lord's Prayer, discloses this fact: in the New Testament, Jesus, in devising the prayer, begins: "And when thou prayest, thou shall not be as the hypocrites are: for they love to pray standing in the synagogues \* \* \*. After this manner therefore pray ye: Our Father which art in heaven \* \* \*." Matthew, 6:5,9.

Differences in religious doctrine may seem immaterial to some, while to others they are vitally important. Sectarian conflicts, bitter animosities and religious persecu-

<sup>14</sup> Unity School of Christianity: see Charles Fillmore, Prosperity, Kansas City, 1938.

tions have had their origin in apparently slender distinctions. *Ring v. Board of Education, supra.*<sup>15</sup>

That Catholics consider it of importance is shown by such a work as "Morals in Politics and Professions," written by Father Francis J. Connell, Associate Professor of Moral Theology at the Catholic University of America, which bears the imprimatur of the Archbishop of Baltimore—Washington (1946). This presumably officially-approved work advises teachers of the Catholic faith who teach in schools where Bible reading is required to "bring her own Bible to class and read it to the pupils" (Chapter 12). The same book instructs the Catholic teacher not to recite the phrase "For thine is the Kingdom, etc." when the recitation of the Lord's Prayer is called for, because "in practice these words have taken on a Protestant connotation, so their use would constitute approval of heresy."

What is the position of a Protestant child in such an instance? As the Nebraska court said, in *Freeman v. Schieve*, 65 Nebr. 853, 91 N. W. 826 (1902):

"They have been obliged to give homage to God, not according to the dictates of their own consciences or the consciences of their parents, but according to the dictates of the conscience of the teacher."

In the *Ring v. Board of Education* case in Illinois the petitioners were Catholics who objected to the reading of the King James Bible because it was inconsistent with their doctrines. They objected, and the Court sustained their objection, that the teachers of the school, by reading the King James translation were teaching their children religious doctrine different from that which they were taught by

<sup>15</sup> "Religious expressions which are as real as life to some may be incomprehensible to others." *United States v. Ballard*, 322 U. S. 78 (1944), at 86.



their parents. "Why," said the Court, "should the state compel them to unlearn the Lord's Prayer as taught in their homes and by their church, and use the Lord's Prayer as taught by another sect?" By the same token, why should Protestant children, where they are taught by a Catholic teacher, be subjected to a Bible which is inconsistent with the religion taught them at home?

The Illinois Court said further:

"The Bible, in its entirety, is a sectarian book as to the Jew and Free Believer in any religion other than the Christian religion, and as to those who are heretical or who hold beliefs that are not regarded as orthodox. Whether it may be called sectarian or not, its use in the schools necessarily results in sectarian instruction. There are many sects of Christians, and their differences grow out of their differing constructions of various parts of the Scriptures \* \* \* the different conclusions drawn as to the effect of the same words. The portions of Scripture which form the basis of these sectarian differences cannot be thoughtfully and intelligently read without impressing the reader, favorable or otherwise, with reference to the doctrines supposed to be derived from them. \* \* \* No test suggests itself to us, and perhaps it would be impossible to lay down one, whereby to determine whether any particular part of the Bible forms the basis of or supports a sectarian doctrine. Such a test seems impracticable. The only means of preventing sectarian instructions in the school is to exclude altogether religious instruction, by means of the reading of the Bible or otherwise. The Bible is not read in the public schools as mere literature, or mere history. It cannot be separated from its character as an inspired book of religion."

To the same effect is the South Dakota case of *Finger v. Veedman*, 226 N. W. 348 (1929), in which the Court said:

"It may be argued that the peace and safety of the state is enhanced by the teaching of our youth morality, reverence, and wholesome religious beliefs. Speaking for myself, I think it is; but it does not follow that a reading of the King James version of the Bible in our public schools is essential to such teachings. Respondents frankly concede that the reading of any version would accomplish the same purpose. The difficulty in reading any version in the public schools seems to be in agreeing upon the version to be read and the person who reads it. But it is not necessary, for the teaching of religion to the youth, that it be taught in the public schools. We have many churches whose function it is to teach religion. The teaching of that particular subject in public schools seems to be so fraught with difficulties and dissensions that it is not practical to undertake it.

"The King James version is a translation by scholars of the Anglican church bitterly opposed to the Catholics, apparent in the dedication of the translation, where the Pope is referred to as 'that man of sin,' and in which the translators express themselves as expecting to be 'traduced by Popish persons' who will malign them, because such persons desire to keep the people in 'ignorance and darkness.' We are satisfied that neither the evidence nor reason will justify us in sustaining the trial court's finding that the differences in the two versions of the Bible for a religious purpose are not substantial. History of the conflicts between Catholics and Protestants over those very differences refutes such conclusion. It makes no difference what our personal views may be as to the importance of the controversial words. As officers of the state, speaking for the state, neither we nor the teachers of the public schools can say that one side is right and the other wrong. We must leave that to the conscience of those involved."

There therefore can be no other conclusion than that the provisions of the New Jersey statute in question make it possible, nay inevitable, for one religion to be favored and others to be discriminated against. The New Jersey law does not set forth which version of the Old Testament or of the Lord's Prayer should be used. In fact, it seems obvious that if the legislature attempted to specify a specific version, such an attempt would be clearly discriminatory and illegal. It is not less discriminatory and illegal when the election is left to the discretion of a particular school board, a particular principal, or a particular teacher. In any case, whoever does the selecting, it works a discrimination and a preference.

## POINT VI

The fact that children are not compelled to remain in the classroom while the Bible is being read or the Lord's Prayer repeated, but may withdraw therefrom, does not cure the evil of the statute, but, in fact, admits it.

Defendants assert and plaintiffs admit that the School Board of the defendant Borough of Hawthorne will permit any child to withdraw from the classroom during the reading of the Bible or the repeating of the Lord's Prayer. The claim is that this presumed freedom cures the constitutional defect in the law and in the practice. This contention, although the basis of some decisions, has been determined to be without merit, both by the United States Supreme Court and by state courts.

It should be noted that the New Jersey statute in question does not provide for a withdrawal from the classroom of any aggrieved student but that such withdrawal is permitted by a regulation of the Board of Education of Haw-

thorne. There may actually be some question as to whether the Board has the right to make such a regulation and it might reasonably be maintained that the Board by permitting such withdrawal is actually in violation of the statute. Conceding the legality, however, of the Board's action, this practice does not condone the statute but is, in fact, a tacit admission that the religious practice required by the statute is an infringement of individual rights.

This argument in favor of Bible reading in the schools has been answered by the Illinois Supreme Court, in the *Ring* case, *supra*, when it said:

"That suggestion seems to us to concede the position of the plaintiff in error. The exclusion of a pupil from the part of the school exercises in which the rest of the school joins, separates him from his fellows; puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma, and places him at a disadvantage in the school, which the law never contemplated. All this is because of his religious belief. If the instruction or exercise is such that certain of the pupils must be excused from it because it is hostile to their or their parents' religious belief, then such instruction or exercise is sectarian and forbidden by the Constitution."

The Wisconsin Supreme Court, in the case of *Weiss v. District Board*, *supra*, held similarly:

"The answer of the respondent states that the relators' children are not compelled to remain in the schoolroom while the Bible is being read, but are at liberty to withdraw therefrom during the reading of the same. For this reason it is claimed that the relators have no good cause for complaint, even though such reading be sectarian instruction. We cannot give our sanction to this position. When, as in this case, a small minority of the pupils in the public school is excused for any cause from a stated



school exercise, particularly when such cause is apparent hostility to the Bible, which a majority of the pupils have been taught to revere, from that moment the excused pupil loses caste with his fellows and is liable to be regarded with aversion and subjected to reproach and insult. But it is a sufficient refutation of the argument that the practice in question tends to destroy the equality of the pupils which the Constitution seeks to establish and protect and puts a portion of them to serious disadvantage in many ways with respect to the others."

gain, in the same case:

"It is said, if reading the Protestant version of the Bible in school is offensive to the parents of some of the scholars, and antagonistic to their own religious views, their children can retire. They ought not to be compelled to go out of the school for such a reason, for one moment. *The suggestion itself concedes the whole argument.* (Italics supplied)

"And excusing such children on religious grounds, although the number excused might be very small, would be a distinct preference in favor of the religious beliefs of the majority, and would work a discrimination against those who were excused." *Herold v. Parish Board*, 136 La. 134, 68 So. 166, 56 L. R. A. 1915d, 941 (La., 1915).

mitting such withdrawal, this case puts it, is "an *action of discrimination*."

missive withdrawal either as provided in the statute regulation of a particular Board or simply by whim of a particular teacher, proves the inconsistency of any contention that the reading of the Bible and the reciting of the Lord's Prayer in the public schools are not religious exercises or exercises. If the reading is not of a religious character and is educational within the requirements of any school study, then why cannot the attendance be compul-

sory? If attendance cannot be compelled because such reading presupposes a belief in the particular version of the Bible which is being read or the particular version of the Lord's Prayer which is being recited, then it must follow that it is a religious reading and exercise and thus contrary to the First Amendment.

Mr. Justice FRANKFURTER in his concurring opinion in the *McColum* case also rejected the right to withdraw as justification for an invalid religious practice because of the inherent pressure by the school system involved. Mr. Justice FRANKFURTER commented that: "The fact that this power has not been used to discriminate is beside the point" (at 227). He went on:

"That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend. \* \* \* The children belonging to those non-participating sects will themselves have inculcated in them a feeling of separation when the school should be the training ground for habits of community. \* \* \* As a result the public school system of Champaign actively furthers inculcation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences at least among some of the children committed to its care. These are consequences not amenable to statistics. But they are precisely the consequences against which the Constitution was directed when it prohibited the government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages." (at 227)

It is interesting, and not a little amusing, to compare these comments on the question with the Colorado case of *People v. Stanley*, 81 Colo. 276, 255 Pac. 610 (1927). In the Colorado case the Court said:

"It is urged that to absent themselves for a religious reason 'subjects the pupils to a religious stigma and places them at a disadvantage.' We cannot agree to that. The shoe is on the other foot. We have known many boys to be ridiculed for complying with religious regulations, but never one for neglecting them or absenting himself from them."

In the Colorado case it is assumed that those who are excused during the readings will ridicule those who remain; in the other cases cited, that those who remain will ridicule those who are excused. In this disagreement, however, both conclusions reached may well be correct. *Either one results in discrimination and consequently in oppression.*

The discussions on this point by Mr. Justice FRANKFURTER and by the state Courts which have been cited all concern themselves with the fact that withdrawal by a child holds the child up to scorn or ridicule. In these unsettled and hysterical times such an action on the part of a child may do more than subject the child to ridicule—it may be actually dangerous. Many persons today have a tendency to equate opposition to Bible reading in the public schools and the general principle of the separation of church and state with atheism. The same sort of people consider atheism synonymous with Communism. A child courageous enough to ask to be excused from Bible reading thus subjects himself to the danger of being deemed Communistic, un-American, and possibly seditious. That this is not a far-fetched possibility is indicated even by a reading of the opinion in this case by the New Jersey Supreme Court. The latter part of that opinion dealt with this pres-

ent-constitutional test as being, in fact, an attack upon "our way of life." It spoke of organized atheistic society and totalitarianism in the same breath and the implications of the language of the Court are clear (R36). Moreover, the Attorney General of the State of New Jersey, who is counsel for the defendant in this case, recently made a public statement in which he purported to tie up the plaintiffs in this case with Communism.<sup>16</sup>

If the New Jersey Supreme Court, if the Attorney General of the State of New Jersey, can equate opposition to Bible reading in the public schools as an infringement of the United States Constitution with Communism, how can one expect children of public school age or their unsophisticated parents to make any more independent decision when confronted with a non-conforming student?

## POINT VII

Other reasons advanced to justify the reading of the Bible and the reciting of the Lord's Prayer in the public schools are legal and practical fictions.

### (a) The "no comment" provision.

Several of the state statutes prescribing the reading of the Bible provide, as New Jersey's statute does, that the Biblical verses be read "without comment," and some of the cases upholding the practice consider that such a restriction on Bible reading cures the practice of any sectarian tinge.

<sup>16</sup> "Parsons Charges Communist Role in Bible Reading Attack

"Communist money was behind the recent Hawthorne suit in which efforts were made to suppress the reading of Bible verses in public schools. Attorney General Theodore D. Parsons told a Passaic group this week that: 'We have checked into that case and have found that the money behind that suit came from people who would destroy our form of government just as much as those Communist leaders arrested in New York. \* \* \*'" Paterson Evening News, June 23, 1951.



Even if the First Amendment of the United States Constitution were construed as applying only to sectarianism, the "no comment" provision would still be a legal fiction. However, the First Amendment, as construed by this Court in the *Everson* and *McCullum* cases, and as has been shown above, did more than merely impose a duty to be neutral among religions; its purpose, as shown, was to bar the equal treatment of all religions; it was a ban on state aid to religion, not merely a requirement that no particular religion be favored.

Like the provisions which permit a pupil to absent himself during the reading of the Bible, the "no comment" provision is an admission of impropriety. Of no other book used in the school curriculum is it required that no comment be made. The legitimate function of our public schools is to impart secular knowledge to the students, and comment in that connection with such instruction is not only unrestricted but essential, whereas the Bible does not lend itself to use for secular instruction without comment and analysis. As the Court said in the South Dakota case of *Finger v. Weedman*, *supra*, the very limitation placed on comment in connection with the reading of the Bible "discloses the purpose of the order of the school board to enter the field of religious instruction, but not into sectarian controversy." The same court pointed out further that if the Bible were read only for moral instruction, comment would be necessary, but read without comment, it is an act of devotion and worship, "a form of religious instruction, and not a part of the secular work of the school."

**(b) The *de minimis* contention.**

Some courts in upholding Bible reading have argued that an insignificant fraction of the school's time is consumed in such reading: *e.g.*, *Wilkerson v. City of Rome*, 152 Ga. 763, *supra*. This contention does not require extended

comment. In Mr. Justice FRANKFURTER's phrase, such an assertion is "to draw a thread from a fabric" (*McCullum* case, at 231).

The Wisconsin court in the *Weiss* case, *supra*, expressed it well.

"The mere fact that only a small fraction of the school hours is devoted to such worship in no way justifies such use as against an objecting taxpayer. If the right be conceded, then the length of time so devoted becomes a matter of discretion. If such a right does not exist, then any length of time, however short, is forbidden."<sup>17</sup>

(c) "Quieting the pupils."

One of the most interesting reasons for justifying the reading of the Bible or the reciting of the Lord's Prayer is that they serve the purpose of "quieting pupils and preparing them for their daily studies." This purpose was advanced by the lower New Jersey court in the instant case and also expressed in such a case as *Billard v. Board of Education of Topeka*, 69 Kan. 63, *supra*. We doubt that the use of the Lord's Prayer or the Bible as a sedative would meet with the approval of most proponents of the practice; and certainly there is an obvious contradiction between this contention and the assertion that the repetition of the Lord's Prayer and the reading from the Bible serve to inculcate principles of piety, justice, and benevolence. The reading of the Lord's Prayer and chapters from the Bible can be either an influence for good or a soporific—they cannot be both at the same time.

<sup>17</sup> "Who does not see that the same authority . . . which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" Madison: Memorial and Remonstrance Against Religious Assessments, annexed as an Appendix to this Court's opinion in the *Everson* case, at 65.

Like the other reasons advanced from time to time to justify these practices, the statement that the purpose is to quiet the pupils is another legal and practical fiction by which a practice improper on its face is sought to be justified for reasons which are not germane. As a matter of fact, there is a certain amount of intellectual dishonesty in proposing such excuses: certainly the legislature in authorizing the repeating of the Lord's Prayer, or prescribing the reading of the Bible was not concerned with matters of classroom discipline, and if the quieting of the pupils is so pressing a matter there must be many other methods of achieving this and without resorting to the use of a religious text which necessarily arouses religious dissention.

**(d) The longevity contention.**

Defendants in their answer make the assertion that the statutes in question have been in existence for a long time and that, by some mysterious alchemy of venerableness, have thus been transformed into constitutional enactments.

Plaintiffs believe that there is no merit to this point and it requires little comment. The cases uniformly hold that mere antiquity cannot save an unconstitutional statute. Time cannot validate what was not valid in the first place. *Browne v. Connor*, 138 Me. 63, 21 A. 2d 709; *Price v. Clawns*, 180 Md. 532, 25 A. 672; *Page v. Carr*, 232 Pa. 371, 81 A. 430.

**(e) The "majority rule" argument.**

The latest reason advanced by a responsible Court to justify the reading of the Bible is found in the New Jersey Supreme Court's opinion in this case. The Court decided that the Old Testament is not a sectarian book because "it is accepted by three great religions; the Jewish, the Roman Catholic and the Protestant, and; at least in part, by others.





• • • The adherents of those religions constitute the great bulk of our population. There are religious groups other than the Jewish, the Roman Catholic and the Protestant but in this country they are numerically small and, in point of impact upon our national life, negligible." This, it is submitted, is a new departure in constitutional interpretation. If the constitutionality of a statute is to be determined by the interests of a majority, what function does the United States Supreme Court have left? The Bill of Rights was written to protect the individual and the minority—the majority needs no protection. As Mr. Justice HUGHES said: "It is the individual \* \* \* who is entitled to equal protection of the laws—not merely a group of individuals or a body of persons according to their numbers." *Mitchell v. Interstate Commerce Commission*, 313 U. S. 80 (1941), at 97. As Mr. Justice FRANKFURTER recently put it:

"The treatment of its minorities, especially their legal position, is among the most searching tests of the level of civilization obtained by a society. It is better for those who have almost unlimited power of government in their hands to err on the side of freedom. We have enjoyed so much freedom for so long that we are perhaps in danger of forgetting how much blood it cost to establish the Bill of Rights." *Dennis v. United States*, 71 Sup. Ct. 857, 887 (1951).<sup>18</sup>

<sup>18</sup> How much more truly American in principle, how much more truly religious, how much more truly Christian than this narrow view of the New Jersey Supreme Court is that contained in Roger Williams' famous tract, "Bloody Tenent of Persecution" (contained in Louis M. Hacker's "The Shaping of the American Tradition, Columbia University Press, New York, 1947) page 108:

"\* \* \* Sixthly. It is the will and command of God, that (since the coming of his S<sup>on</sup> and the Lord Jesus) a permission of the most Paganish, Jewish Turkish, or Antichristian consciences and worships, be granted to all men in all Nations and Countries: \* \* \*

Tenthly, an enforced uniformity of Religion throughout a Nation or civil state, confounds the Civil and Religious, denies the principles of Christianity and civility, and that Jesus Christ is come in the Flesh. \* \* \*

Twelfthly, lastly, true civility and Christianity may both flourish in a state or Kingdom, notwithstanding the permission of divers and contrary consciences, either Jew or Gentile."

## CONCLUSION

The public schools of this country are our greatest institution for the inculcation of the American principles of democratic freedom and equality. They should be a unifying influence in the community and not a force to enhance the divisiveness of our people and to lay stress upon differences. The school system is one of the few broad areas left in our country where religious intolerance can be overcome. It is one place where the child is not yet primarily a Protestant, a Catholic, a Jew, or a non-believer, but an American among other Americans.

Public schools are the principal instruments and sources of popular education because they exert, more than any other institution, an influence which promotes homogeneity among our citizens, whose ancestry is drawn from all quarters of the globe. If religious worship, religious exercises, religious services, or sectarian instruction, no matter how lofty their purpose, be permitted in the public schools, parents will be compelled to expose their children to doctrines which they consider contrary to their own conscience, or else bear the burden of supporting out of their pockets religious training in a sect other than their own.

As the Court said in the Nebraska case of *Freeman v. Schieve, supra*:

"It might reasonably be apprehended that such a practice besides being unjust and oppressive, to the persons immediately concerned, would \* \* \* tend forcibly to the destruction of one of the most important if not indispensable foundation stones of our form of government. It will be an evil day when anything happens to lower the public schools in popular esteem or to discourage attendance upon them by children of any class."

When the public school refuses to teach religion, it invades the rights of no one. It does not reject religion nor

does it foster it. It leaves the subject entirely alone and justifies its own existence and support by general taxation on the ground that its function is to provide secular rather than religious education. Religious instruction in the public schools, whether it consists of reading the Bible, singing hymns, or offering prayer, is, in respect to the taxpayer, a coerced support of religion. Such instruction, especially if it is compulsory, is incompatible with the principles of religious liberty and freedom of conscience. Exclusion of Bible reading from the public schools as well as reciting the Lord's Prayer, is the one course that may be pursued with absolute safety, with the assurance that no one's rights are being trampled upon and with a knowledge that perfect justice has been done. Johnson and Yost: Separation of Church and State in the United States (U. of Minnesota Press., 1948).

Mr. Justice FRANKFURTER's language bears repetition:

"The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart." (McCollum case, at 231)

**Plaintiffs therefore submit that Revised Statutes 18:14-77 and 18:14-78 are unconstitutional, that the judgment of the Court below should be reversed, and that both the State of New Jersey and the Board of Education of Hawthorne should be restrained from complying with either of said sections of the law and enjoined from the reading of the Old Testament and the reciting of the Lord's Prayer in the classrooms, either on a compulsory or on a voluntary basis.**

Respectfully submitted,

HEYMAN ZIMEL,  
Counsel for Appellants.

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**IN THE**  
**Supreme Court of the United States**

**No. 9—OCTOBER TERM, 1951**

**DONALD R. DOREMUS and ANNA E. KLEIN,**  
*Appellants,*

**vs.**

**BOARD OF EDUCATION OF THE BOROUGH OF  
HAWTHORNE and THE STATE OF NEW JERSEY,**  
*Respondents.*

**On Appeal From the Supreme Court of the  
State of New Jersey**

**SUPPLEMENTAL BRIEF FOR APPELLANTS**  
**(As to Jurisdiction)**

**HEYMAN ZIMEL,**  
*Counsel for Appellants,*  
**5 Colt Street,**  
**Paterson, New Jersey.**



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## Statement

This supplemental memorandum is written, with the permission of the Chief Justice, to allay certain doubts expressed by members of this Court at the oral argument on January 31, 1952, as to whether the Court can and should take jurisdiction of this case.

The question arose because of a claim by the defendants that the plaintiffs have no standing to bring this action. This claim by the defendants was confusing to counsel for the plaintiffs, since previously, by Pretrial Conference Order, the defendants had waived this defense (R6), and by their motion for summary judgment on the pleadings had admitted all the well-pleaded facts of the complaint.

With respect to the standing of plaintiff Anna E. Klein, as mother of the student directly affected by the unconstitutional practice complained of, defendants' objection might be conceded to have some color, since the daughter has been graduated from school during the course of this suit (although the New Jersey Supreme Court decided the case on the merits after her graduation). But as to the standing of both plaintiffs as taxpayers, defendants' objection has no substance whatsoever. The fact that they are taxpayers is admitted; the law that gives taxpayers the right to bring such an action as this one is clear, in the view of the courts of New Jersey and the United States Supreme Court.

### I.

#### Plaintiffs' Standing as Taxpayers.

The law is clearly established in New Jersey that a taxpayer has a standing to institute an action to set aside

void or unlawful ordinances or laws. Generally this right is recognized by the courts in cases which involve an expenditure of public moneys, on the ground that the interest of a taxpayer in the application of public funds is direct and immediate. But, even where questions of taxation are not at all concerned, the right is recognized in matters of great public interest. In the instant case, there is, of course, involved an expenditure of public funds.

Cases in New Jersey in which such standing has been recognized are legion. The outstanding case is *Ferry v. Williams*, 41 N. J. L. 332 (Sup. Ct., 1879). In that case the court said:

"The English rule, that the redress of wrongs, arising from usurpations and unlawful acts of public officers, which do not directly affect private persons or property, must be attained through the suit of the attorney general, has not been generally followed in the practice of this state. Indeed it is not uniformly observed in the mother country. Judge Cowen, in *People v. Collins*, 19 Wend. 56, refers to several instances of its infringement. Naturally, from the more democratic character of our institutions, greater relaxation of the rule would be likely to obtain among us; and accordingly we find that, from an early period, our courts have exercised a large discretion in annulling the illegal acts of municipal bodies and officers, and compelling the performance of their public duties at the instance of citizens and taxpayers who were not otherwise interested in the controversy than was the rest of the community, while the cases in which the attorney general has interfered for such purposes are quite infrequent. . . . Undoubtedly, most of the cases where private citizens have sued to prevent or redress public wrongs of municipal authorities, are those involving conduct which would lead to expenditure of public moneys, and so increase taxation, but this has arisen rather from the usual character of such wrongs, than from any reason upon which a



remedy would be afforded. *There are certainly instances of interference by the courts with official action affecting only public rights at the suit of private persons, where questions of taxation were not at all concerned, or were so remote from the matters complained of as not to be noticed in the decision.*" (Italics supplied.)

In support of *Ferry v. Williams*, *supra*, are *Millville v. Bd. of Education of Millville*, 100 N. J. Eq. 162; *McGuire v. De Muro*, 98 N. J. L. 684; *Fagan v. State Board of Assessors*, 80 N. J. L. 516; *Bott v. Secretary of State*, 63 N. J. L. 289, 298; *Oliver v. Jersey City*, 63 N. J. L. 96; *aff'd* 63 N. J. L. 634; *Middleton v. Robbins*, 54 N. J. L. 566 (Err. & App.), reversing 53 N. J. L. 555; *Dufford v. Staats*, 54 N. J. L. 286; *Austin v. Atlantic City*, 48 N. J. L. 118; *Dufford v. Nolan*, 46 N. J. L. 87; *Koons v. Atlantic City*, 134 N. J. L. 329; *Karins v. Atlantic City*, 137 N. J. L. 349; *Gimbel v. Peabody*, 114 N. J. L. 574; *Everson v. Bd. of Education*, 133 N. J. L. 350 (E. & A.).

The fact that the individual taxpayer's threatened financial loss might be microscopic is deemed by the courts, both in New Jersey and elsewhere, to be immaterial. In any city or state where there are thousands of taxpayers, the financial interest of any individual is bound to be small, but the courts have held that any financial interest, however infinitesimal, is sufficient. *McQuillan, Munic. Corp.* (2nd) Sec. 2751, page 958; *Bancroft v. Building Commissioners*, 257 Mass. 82, 153 N. E. 319; *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 99 N. W. 603; *Stroud v. Consumers Water Co.*, 56 N. J. L. 422.

Cases which defendants might cite in New Jersey purporting to hold that a single taxpayer cannot attack a municipal or state act unless he shows special injury beyond any injury he has in common with the rest of the public will be found upon examination to go only to the

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choice of remedy, not to the right. The traditional method of testing a public act in New Jersey has been, until the recent revision of the New Jersey Constitution, by the ancient prerogative writs. Relief by the invocation of these writs has always been strictly construed and where the courts have refused relief to a taxpayer because of a lack of a showing of special injury the cases have only gone to the extent of denying the issuance of a particular writ—of certiorari or mandamus, as the case may be—the rationale of the decisions being that certiorari will be denied when there is another remedy, by indictment or by other civil action (such as injunction). *Oliver v. Jersey City*, 63 N. J. L. 96 (1899). In short, those cases do not deny an individual taxpayer's right to bring an action, despite the absence of any special injury, but merely declare that he may have selected the wrong remedy.

## II.

**The United States Supreme Court has recognized this rule.**

The rule, with reference to a taxpayer's attack on Federal legislation is concededly different. The leading case is that of *Massachusetts v. Mellon*, 262 U. S. 446. But that case safeguards the jurisdiction of the United States Supreme Court in taxpayers' suits where the attack is upon the action of a municipality or state. Mr. Justice SUTHERLAND, writing the opinion in *Massachusetts v. Mellon*, said (at page 483):

“The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate, and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of this court. *Crampton v. Zabriskie*, 101 U. S. 601, 609, 25 L. ed. 1070, 1071.”

In the same case, Mr. Justice SUTHERLAND referred to the case of *Bradfield v. Roberts*, 175 U. S. 291, in which the taxpayer's suit was sustained as against the District of Columbia and, as the court said, "therefore subject to the rule frequently stated by this Court, that resident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation."

This Court, as recently as 1947, took jurisdiction of a case out of the State of New Jersey involving the precise provision of the First Amendment which is here involved. This was the case of *Everson v. Bd. of Education*, 330 U. S. 1, in which the plaintiff, Everson, was a taxpayer attacking a state law as being in violation of the First Amendment of the United States Constitution, exactly as the plaintiffs in this case have done. There is no substantial difference, jurisdictionally speaking, between that case and this.

### III.

**The standing of the plaintiff as the mother of a child affected by the statute.**

It would appear that, since plaintiff Klein's daughter has been graduated from school since the institution of this action, the question involved is moot as to her and that, in this respect, this Court no longer has jurisdiction. Nevertheless, plaintiffs submit, this Court should retain jurisdiction in a matter of such importance to the general public.

It should be pointed out, in the first place, that the New Jersey Supreme Court, although advised at oral argument of the girl's graduation, nevertheless proceeded to decide the case on the merits. If this Court now hesitates to take jurisdiction of the case, the decision of the New

Jersey Supreme Court will stand as the last word on a subject of great interest to the country, and upon which there is a vast diversity of opinion in the various state courts.

The matter involved in this appeal concerns many more persons than Gloria Klein. Indeed, if only Gloria Kleir were involved, this Court could conceivably refuse to take jurisdiction, in its discretion, regardless of her rights, on the ground that the question was not substantial enough for this Court to take cognizance of. By the same token, in view of the fact that the case is substantial and of great public concern, plaintiffs respectfully suggest that this Court should take jurisdiction and decide the case on the merits, despite the technical objection that the status of one of the plaintiffs has changed during the course of the litigation.

Whether or not this Court sees fit to entertain jurisdiction on this ground, the standing of both plaintiffs as taxpayers still persists.

### CONCLUSION

Plaintiffs therefore submit that this Court has, and should exercise, jurisdiction over this appeal and determine the case on the merits.

Respectfully submitted,

HEYMAN ZIMEL,  
*Counsel for Appellants.*



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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1950**

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**No. 536 9**

**DONALD R. DOREMUS AND ANNA E. KLEIN,**

*Appellants,*

*vs.*

**BOARD OF EDUCATION OF THE BOROUGH OF  
HAWTHORNE AND THE STATE OF NEW JERSEY**

**APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY**

**STATEMENT OPPOSING JURISDICTION AND  
MOTION TO DISMISS OR AFFIRM**

**THEODORE D. PARSONS,**

*Attorney General of New Jersey;*

**HENRY F. SCHENK,**

*Deputy Attorney General of New Jersey;*

**ALEXANDER E. FASOLI,**

*Counsel for Appellees.*

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### Argument:

Appellants sue as a citizens and taxpayers  
and of them sues as parent of a minor  
child. They have now shown sufficient in-  
jury to raise a substantial federal ques-  
tion.

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Acquiescence by the people and particularly  
of these appellants in the practices com-  
plained of for such a long period of time  
creates a presumption of validity, estops  
appellants and eliminates any substantial  
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The statutes involved were enacted by the  
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 556

DONALD R. DOREMUS AND ANNA E. KLEIN,  
*Appellants,*  
*vs.*

BOARD OF EDUCATION OF THE BOROUGH OF  
HAWTHORNE AND THE STATE OF NEW JERSEY,  
*Appellees*

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

**STATEMENT OF APPELLEES MAKING AGAINST  
THE JURISDICTION OF THE SUPREME COURT  
OF THE UNITED STATES TO REVIEW ON APPEAL  
THE JUDGMENT IN QUESTION, INCLUDING AP-  
PELLEES' MOTION TO DISMISS OR AFFIRM THE  
APPEAL**

The appellees, believing that the matters set forth below will demonstrate the lack of substance in the questions raised by this appeal, file this, their statement in opposition to appellants' statement as to jurisdiction. Appellees include herein their motion to dismiss the appeal on the ground of lack of jurisdiction, or in the alternative to affirm the judgment of the Supreme Court of New Jersey



on the ground that the questions raised by the appellants are so unsubstantial as not to need further argument.

This cause appears to be reviewable by the Supreme Court on direct appeal from the Supreme Court of New Jersey. Appellees assert, however, that jurisdiction is lacking under the statute and in addition the unsubstantial character of the grounds stated by appellants are so apparent on the face of the record as to warrant the Court in summarily disposing of the appeal at this stage of the proceeding.

The appellants, Donald R. Doremus and Anita E. Klein, served on appellees, Board of Education of the Borough of Hawthorne and the State of New Jersey on April 27th, 1949, a summons and complaint in the nature of a complaint for a declaratory judgment declaring that New Jersey Revised Statutes 18:14-77 and 18:14-78 are unconstitutional as being in violation of the First and the Fourteenth Amendments of the United States Constitution. Revised Statute 18:14-77 provides:

"At least five verses taken from that portion of the Holy Bible known as the Old Testament shall be read, or caused to be read, without comment, in each public school classroom, in the presence of the pupils therein assembled, by the teacher in charge, at the opening of school upon every school day, unless there is a general assemblage of the classes at the opening of the school on any school day, in which event the reading shall be done, or caused to be done, by the principal or teacher in charge of the assemblage and in the presence of the classes so assembled."

R. S. 18:14-78 provides:

"No religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools."

The First and Fourteenth Amendments to the United States Constitution provide in part:

I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

XIV. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Appellees duly filed their answers denying that appellants had a substantial interest in the matter and further denying the unconstitutionality of the statutes in question. The matter came on for hearing in the New Jersey Superior Court Law Division, Passaic County, upon cross-motions by appellants and appellees for summary judgment on the pleadings. After argument and consideration of the applicable law, the Court granted the appellees' motion for summary judgment on the pleadings and held the statutes to be constitutional and not in contravention of the cited provisions of the United States Constitution.

The appellants duly filed their notices of appeal to the Appellate Division of the New Jersey Superior Court, and appellee, State of New Jersey, filed its application for certification of the Law Division's decision directly to the New Jersey Supreme Court. Said application for certification of the entire matter was granted and the cause was duly argued at the September 1950 term of the New Jersey Supreme Court.

On October 16, 1950, the New Jersey Supreme Court upheld the decision of the Superior Court Law Division, and concluded that the statutes under attack were valid.

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The appellants on January 16, 1951, served an order allowing the appeal to this Court, together with supporting papers, upon the appellees, State of New Jersey and the Board of Education of the Borough of Hawthorne.

## **MATTERS AND GROUNDS MAKING AGAINST JURISDICTION**

### **I**

**Appellants Sue as Citizens and Taxpayers and One of Them Sues as Parent of a Minor Child. They Have Not Shown Sufficient Injury To Raise a Substantial Federal Question.**

The complaint is one for declaratory judgment, and appellants are without legal standing to press such a claim.

The law is well settled that in a proceeding for a declaratory judgment the jurisdiction of the Courts may not be invoked in the absence of an actual controversy. Not only must the appellants prove their tangible interest in obtaining a judgment but the action must be one adverse in character. That is, there must be a controversy between the plaintiff and the defendant having an interest in opposing a claim, subject to the Court's jurisdiction.

The New Jersey Supreme Court in its opinion below recognized this principle and stated that there was substance to appellees' argument. (Appellants Statement as to Jurisdiction Appendix A, page 10.)

The complaint in paragraphs 1 and 2 states that the interest of the plaintiffs is as citizens and taxpayers of the State of New Jersey.

With respect to the suit by plaintiffs as citizens it is clearly and unequivocally stated in Vol. 12 of Corpus Juris, "Constitutional Law," page 761, Section 179, that a mere citizen having no interest in the validity of a law beyond that of other citizens and not professing to sue on behalf



of others may not raise the question of the constitutionality of a statute. With reference to the plaintiffs' (appellants') status as taxpayers, a taxpayer may not question the constitutionality of a statute which does not affect him. In the case at Bar the appellants have alleged their status as citizens and taxpayers which is admitted by appellees. The appellants, however, have failed to show that as citizens they have been injured, that as taxpayers they have been injured or that as citizens and taxpayers they have been injured. They merely admit a certain state of facts which admission is concurred in by the appellees, but they fail to prove that predicated upon these facts they have suffered any injury, or been deprived of any liberty or property right by virtue of the compliance with the statutes under examination. The appellants claim that their consciences are being violated by the forced exaction of taxes for the support of religion to which they conscientiously object. No specific tax is referred to but rather an unmeasured use of tax funds. Nor is there a showing that such use impairs the ability of appellants to practice their conscientious beliefs. Whether they object as believers or non-believers and to what extent and in what manner they have suffered injury is not revealed or proved.

In the case of *Frothingham v. Mellon*, 262 U. S. 447 (U.S. Sup., 1923), a Mrs. Frothingham sued in the District Court of the District of Columbia to enjoin the Secretary of the Treasury and other Federal officials from enforcing the Maternity Act of 1921 on the ground that it was unconstitutional and hence that as a taxpayer of the United States the plaintiff by its enforcement would be deprived of her property without due process of law. Her bill was dismissed in the District Court and both the Court of Appeals and the Supreme Court of the United States affirmed.

The Frothingham case was used as the basis of the decision in *Elliott v. White*, 23 Fed. (2d) 997 (Ct. App., D.C.



1928), in which case the Court dismissed a bill against the Treasurer of the United States to prevent the payment of salaries to Chaplains of the Senate, House of Representatives, Army and Navy. The plaintiff contended that the employment of such chaplains constituted a religious establishment in violation of the First Amendment. In the latter case, the plaintiff sued in the capacity of a citizen rather than that of a taxpayer but it was nevertheless held that merely being a citizen or being a taxpayer without injury or damage particularly shown, was not sufficient cause to sustain an action.

Predicated upon this theory of law which is undeniably correct, it is obvious that Donald R. Doremus, one of the appellants to the cause before the Bar, has individually failed to prove either his injury as a citizen or his injury as a taxpayer. Donald R. Doremus is admittedly a citizen and a taxpayer but he has conclusively failed to set forth what his interest is or what injury he has suffered to warrant this Court entertaining his appeal. Similarly, Anna Klein has likewise failed to show the necessary element of injury or damage either to herself or to her daughter, and has not demonstrated the adverse character of the proceeding.

The basic principle involved was stated by Justice Sutherland in the Supreme Court (Erothingham case, *supra*) as long ago as 1923. He said:

"We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. . . . The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he

suffers in some indefinite way in common with people generally."

In *Coleman v. Miller*, 307 U.S. 433 (U.S. Sup. 1939) Mr. Justice Frankfurter said:

"No matter how seriously infringement of the Constitution may be called into question, this is not the tribunal for its challenge except by those who have some specialized interest of their own to vindicate, apart from a political concern which belongs to all."

While these words are from a dissenting opinion, they voice the view of the Court as a whole on this particular point as is shown by the Court's ruling that Coleman had a sufficient interest to entitle him to prosecute the case before it.

In the case of *McCullum v. Board of Education*, 333 U.S. 203 (U.S. Sup. 1948) Mr. Justice Jackson expresses doubts as to whether or not the Court should take jurisdiction in a somewhat similar situation. He said:

"In the *Everson* Case there was a direct, substantial and measurable burden on the complainant as a taxpayer to raise funds that were used to subsidize transportation to parochial schools. Hence, we had jurisdiction to examine the constitutionality of the levy and to protect against it if a majority had agreed that the subsidy for transportation was unconstitutional.

"In this case, however, any cost of this plan to the taxpayers is incalculable and negligible. It can be argued, perhaps, that religious classes add some wear and tear on public buildings and that they should be charged with some expense for heat and light, even though the sessions devoted to religious instruction do not add to the length of the school day. But the cost is neither substantial nor measurable, and no one seriously can say that the complainant's tax bill has been proved to be increased because of this plan. I think it is doubtful whether the taxpayer in this case has shown any substantial property injury."

Certainly in the case at Bar the injury, if any, to appellants is incalculable and negligible. In the McCollum case there was the element of "released time" for a substantial portion of the school day for admitted sectarian instruction. Not so in the case at Bar where the acts complained of consumed such a minor portion of the school day in non-sectarian activity.

The case at Bar is a perfect example of a situation where the maxim "de minimus non curat lex" should be applied. The law does not bother with trifles; and in view of the above discussion and further in view of the fact that the appellant Klein's daughter has graduated, her injury, if any, is trifling.

## II

**Acquiescence By the People and Particularly of These Appellants in the Practices Complained of For Such a Long Period of Time Creates a Presumption of Validity, Estops Appellants and Eliminates Any Substantial Federal Question.**

Examination of Title 18, Chapter 14, Section 77 (N.J.R.S. 18:14-77), commonly known as "Reading Bible at opening of school," discloses that it had its inception and did first appear upon the law books of the State of New Jersey under Chapter 263 of the Laws of 1916, and read as follows:

"1. In each public school classroom in the State and in the presence of the scholars therein assembled, at least five verses from that portion of the Holy Bible known as the Old Testament shall be read or caused to be read, without comment, at the opening of such school, upon each and every school day by the teacher in charge thereof; provided that whenever there is a general assemblage of school classes at the opening of such school-day, then instead of such classroom reading, the principal or teacher in charge of such assemblage shall read at least five verses from



said portion of the Holy Bible or cause the same to be read in the presence of the assembled scholars as herein directed.

"2. This act shall take effect immediately."

Title 18, Chapter 14, Section 77, of the New Jersey Revised Statutes (N.J.R.S. 18:14-77) is substantially the same as the parent act above set forth. Other than the fact that the subsequent statute has been condensed through a rephrasing of the words used, it speaks and conveys the very same thought and demands the very same duties. The subsequent statute, when incorporated and made a part of the Revised Statutes, was changed solely in phraseology and not in thought or content. Therefore the duty of reading the Bible, without comment, in our public schools, daily, has been a part of our State Laws for approximately 35 years.

Throughout these 35 years, that statute has remained unchallenged. Throughout these 35 years that statute has been faithfully complied with without ever having been questioned in any manner in this State.

R. S. 18:14-78 has been on the books 48 years. It was enacted as Section 114, Chapter 1 (Second Special Session) of the Laws of 1903 and read as follows:

"No religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools."

There is no evidence that by compliance with the statutes, any person's constitutional rights, immunities or liberties have ever been infringed. There is certainly no evidence that the school systems in complying with the statutes, have, through such compliance, established a church or religion, established sectarian instruction, or inculcated a



dogma or creed. The practice and procedure called for by the statutes is the very same today as it was when the parent acts were first incorporated into our laws, 35 years ago and 48 years ago, respectively. There is no indication of expansion of the duties or powers called for under the statutes. The statutes have never been used as a means of infiltrating our educational system with religion or religious practices; they have never been used for purposes of sectarian instruction.

These statutes having been upon our law books for so many years, are presumed to be constitutional. The cases state clearly that a statute must be construed if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts on that score. In testing the constitutionality of a statute, the language must receive such construction as will conform it to any constitutional limitation or requirement, if it is susceptible of such interpretation, and the statutes and constitutional provisions must be read together and so harmonized as to give effect to both when this can be consistently done. If a statute is susceptible of two constructions, one which will render it constitutional and the other of which will render it unconstitutional in whole or in part, or raise grave and doubtful constitutional questions, the Court will adopt that construction which, without doing violence to fair meaning of language, will render it valid, in its entirety, or free it from doubt as to its constitutionality, even though the other construction is equally reasonable, or seems the more obvious, natural and preferable interpretation.

This rule is based on the presumption that the Legislature did not intend to violate the constitution but intended to act within the scope of its lawful powers and to enact a valid and effective statute.

As a consequence of the rule of construction in favor of validity, the Courts will not adopt a strained, doubtful,

restricted, rigid or literal interpretation in order to condemn a statute as unconstitutional. Neither will the Courts sustain an attack on a statute, if there is a reasonable theory on which it may be constitutionally upheld. Where a statute has been in force for a long period of time during which time its construction has been unquestioned, (as in this case) the Court will decline to give it a contrary construction which would render it void, unless compelled to do so by unequivocal language in the act. (Corpus Juris Secundum. Volume 16, Constitutional Law, Section 98, page 234 et seq.)

A contemporaneous, uniform, legislative construction of constitutional provisions adopted and acted on with the acquiescence of the people for many years has always been entitled to great weight. *Okanogan Indians v. United States*, 279 U.S. 655, 688 (U.S. Sup. 1929); *Hanover Fire Insurance Co. v. Harding*, 327 Ill. 590, 603, 158 N.E. 849 (Ill. Sup. 1927). The New Jersey Supreme Court expounded the applicable law through its Court of Errors and Appeals in the case of *Legg v. Passaic County*, 122 N.J.L. 100, affirmed 123 N.J.L. 263. The Court said:

"We think it proper to point out that one of the fundamental policies of our jurisprudence is not to declare unconstitutional a statute which has been in force without any substantial challenge for many years, *unless its unconstitutionality is obvious.*"

Appellants, by their actions, have estopped themselves and waived their right to question the constitutionality of the statutes under examination.

A person may by his acts, or omissions to act, waive a right which he might otherwise have under the provisions of a constitution. Thus, a person who has acquiesced in the proceedings under a statute may not question its constitutionality. While it is true that acquiescence in an

unconstitutional statute for many years will not render it valid, it is also true, that the proposition "if an act is invalid when passed the vice continues and the statute may be annulled at any time," does not apply to political or administrative (ministerial) legislation but such laws must be attacked in seasonable time without delay. 12 Corpus Juris, "Constitutional Law," 769, sec. 190. In the case at Bar the statutes under attack are predicated upon the ministerial legislation known as "Title 18 of the New Jersey Revised Statutes" and commonly known as the "Statutes on Education." Being such administrative legislation, the same is therefore beyond attack at the present time because the essence of the two statutes in question has been upon the law books of the State of New Jersey in substantially the same form for the past 35 years and 48 years respectively.

It is admitted in the facts of the case at Bar that neither the parents nor the daughter has ever asked to be excused while the school authorities were dutifully complying with the statutes under examination, but, on the contrary, the daughter participated and was present at such compliance with the statutes on each and every school day when she was not absent for other reasons. She has now graduated. In fact, and by inference, the injury, damage or harm that allegedly was being done must either have been decidedly minimum and of no consequence, or non-existent because the student through her own acquiescence and that of the parent continued to participate actively in that portion of the school day's work.

### III

#### **The Statutes Involved Were Enacted By the State of New Jersey Pursuant To Valid Exercise of the Police Power.**

The police power means the general power of a government to preserve and promote the public health, safety, morals, comfort or general welfare even at the expense of



private rights. *State v. Old Tavern Farm Inc.*, 133 Maine 468, 180 Atl. 473 (Maine Supreme Judicial Court 1935). The police power has, of course, been reserved to the states and not delegated to the Federal government. *Keller v. United States*, 213 U.S. 138, 53 L. Ed. 737, 29 Sup. Ct. 470, 16 Ann. Cas. 1066 (U.S. Sup. Ct. 1909); *State v. Old Tavern Farm Inc.*, supra.

That the subject matter of this controversy is an appropriate matter for legislation, regulation and control under the police power cannot well be questioned. The State is charged with the general power to promote the *morals* of the public and has seen fit to do so by enactment of the statutes in question.

The case is clearly distinguishable from that of *McCullom v. Board of Education*, 333 U.S. 203 (1948) relied on so strongly by appellants in their statement as to jurisdiction. In that case the Legislature of the State of Illinois had not spoken on the matter. Involved was merely an administrative ruling of the local Board of Education. In this case, however, the people of the State of New Jersey through their elected representatives, the public policy-making organization of the State, have seen fit to enact the legislation in question after solemn deliberation. This Court has held that education under the Federal Constitution is a matter of State power and not of Federal power, and is not to be interfered with unless the constitutional rights guaranteed by the Federal Constitution are clearly infringed. *Cumming v. Richmond County Board of Education*, 175 U.S. 528, 545 (U.S. Sup. 1899); *Gong Lum v. Rice*, 275 U.S. 78, 85 (U.S. Sup. 1927).

In *Adamson v. California*, 332 U.S. 46, Mr. Justice Reed said at p. 53:

"It accords with the constitutional doctrine of federalism by leaving to the states the responsibility of dealing with the privileges and immunities of their citizens except those inherent in national citizenship."



The only means of enforcing the First Amendment to the Federal Constitution against the State of New Jersey is by virtue of the Fourteenth Amendment. *W. Virginia State Board of Education v. Barnett*, 319 U.S. 624, 639.

The preamble of the New Jersey Constitution of 1844 reads as follows:

"We, the people of the State of New Jersey, grateful to *Almighty God for the civil and religious liberty* which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations, do ordain and establish this constitution:"  
(Italics ours.)

This preamble has been carried over into the Constitution of 1947.

The Fourteenth Amendment to the United States Constitution was adopted by the requisite number of States and became a part of that constitution in the year 1868. Under the Tenth Amendment to the Federal Constitution all powers not delegated to the United States by the Constitution or prohibited by it to the States are reserved to the States respectively or to the people. When the Fourteenth Amendment was adopted in 1868 the drafters of the Amendment must have contemplated and been aware of the New Jersey Constitution of 1844 and similar State Constitutions then in existence and therefore recognized that the State of New Jersey and the other States were and are in fact composed of religious peoples.

Pursuant to the above notion that the State of New Jersey is composed of religious peoples their elected representatives enacted the legislation in question in the exercise of the police power.

# **Motion To Dismiss or Affirm**

Appellees respectfully submit this statement showing there is no substantial Federal question involved and consequently a lack of jurisdiction.

Wherefore, appellees respectfully move the Court to dismiss the appeal in this cause or in the alternative to affirm the judgment of the Supreme Court of New Jersey.

Respectfully submitted,

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**Supreme Court of the United States**

**No. 9—OCTOBER TERM, 1951**

**DONALD R. DOREMUS and ANNA E. KLEIN,**

*Appellants,*

**vs.**

**BOARD OF EDUCATION OF THE BOROUGH OF  
HAWTHORNE and THE STATE OF NEW JERSEY,**

*Appellees.*

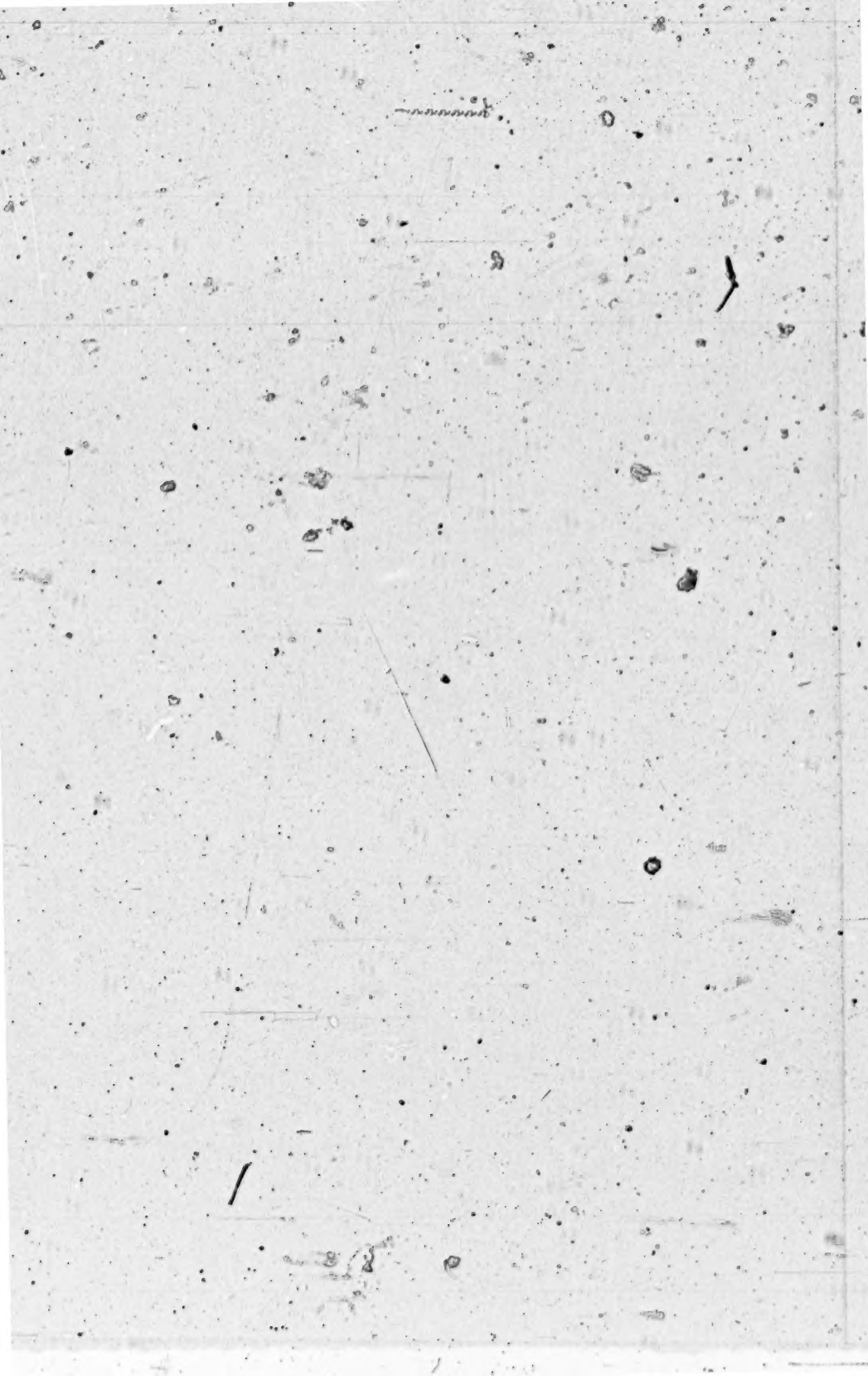
**On Appeal From the Supreme Court of the  
State of New Jersey**

**BRIEF FOR APPELLEE BOARD OF EDUCATION  
OF THE BOROUGH OF HAWTHORNE**

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## **Opinions Below**

The opinion of the Supreme Court of the State of New Jersey (R22-38) is reported at 5 N. J. 435, 75 A. 2d 880. This opinion affirmed a decision of the Superior Court of the State of New Jersey, Law Division, whose opinion (R7-16) is reported in 7 N. J. Super. 442, 71 A. 2d 732.

## **Jurisdiction**

The judgment and mandate of the Supreme Court of New Jersey was entered on October 16, 1950 (R21). An order allowing appeal to the Supreme Court of the United States was made by Mr. Justice BURTON on January 12, 1951 and filed January 19, 1951 (R38). A Statement as to Jurisdiction having been filed with this Court in accordance with Rule 12, on March 12, 1951, this Court made its order in which further consideration of the question of jurisdiction of this Court and of the motion to dismiss or affirm was postponed to the hearing of the case on the merits (R43).

## **Statutes Involved**

The Statutes involved are Revised Statutes of New Jersey (1937) 18:14-77 and 18:14-78.

R. S. 18:14-77 provides:

"At least five verses taken from that portion of the Holy Bible known as the Old Testament shall be read, or caused to be read, without comment, in each public school classroom, in the presence of the pupils therein assembled, by the teacher in charge, at the opening of school upon every school day, unless there is a general assemblage of the classes at the opening of the school on any school day, in

which event the reading shall be done, or caused to be done, by the principal or teacher in charge of the assemblage and in the presence of the classes so assembled."

R. S. 18:14-78 provides:

"No religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools."

The First Amendment to the United States Constitution provides in part:

"I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; \* \* \* \* \*"

The Fourteenth Amendment to the United States Constitution provides in part:

"XIV. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; nor shall any State deprive any person of Life, Liberty, or Property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

### **Counter-Statement of Questions Presented**

1. Have Appellants in this cause suffered injury sufficient to permit them to maintain this action and, if so, are they estopped by their acquiescence in the practices complained of?

2. Whether Title 18, Chapter 14, Section 77 of the Revised Statutes of New Jersey, which in substance requires the daily reading of a portion of the Holy Bible known as the Old Testament, without comment, in each public school classroom or public school assemblage, of the State, is repugnant to the First and Fourteenth Amendments of the United States Constitution?
3. Whether Title 18, Chapter 14, Section 78 of the Revised Statutes of New Jersey, which permits the repeating of the Lord's Prayer and the reading of the Bible in the public schools of the State, is repugnant to the First and Fourteenth Amendments of the United States Constitution?

### **Counter-Statement of Facts**

The statement of facts set forth in Appellants' brief AB-4) is substantially correct. However, Appellee, Board of Education wishes to bring to the Court's attention that the daughter of Appellant, Anna E. Klein, is no longer a student in the public schools of the Appellee, she having graduated therefrom.

Appellee Board of Education, wishes to further stress that the question of constitutionality under the First and Fourteenth Amendments of the United States Constitution was not the sole issue below, but Appellees, jointly argued that the Appellants were without legal standing to press their claim; that Appellants were estopped; that Appellants had waived their rights; and that the long existence of the statutes in question, without challenge, had established their validity. In fact, the New Jersey Supreme Court speaking through CASE, J., stated that the points had substance but the Court nevertheless concluded to dispose of the appeal on its merits (R24-25).



## Summary of Argument

The law is well settled that a mere citizen having no interest in the validity of a law beyond that of other citizens and not professing to sue on behalf of others, may not raise the question of the constitutionality of a statute. One who is a taxpayer, as such, may not question the constitutionality of a statute which does not affect him.

Appellants allege their status as citizens and taxpayers but have failed to show that as citizens they have been injured, that as taxpayers they have been injured or that as citizens and taxpayers they have been injured. They merely allege a certain state of facts, admitted by the Appellees, but have failed to prove, that predicated upon these facts they have suffered any injury or have been deprived of any property right or of any liberty, by virtue of their subjection to the questioned statutes.

With respect to Appellants' contention that their consciences are being violated by forced exaction of taxes for the support of religion to which they conscientiously object; they refer to no specific tax but rather to an unmeasured use of tax funds and fail to show that such use of tax funds impairs the ability of the Appellants to practice their conscientious belief. Whether they object as believers or non-believers and to what extent and in what manner they have suffered injury is not revealed or proved.

As a nation, we are unquestionably religious in character, and being so, it was never the intention of Congress or the people of the nation, themselves, to strip the government of non-sectarian recognition of God. The so-called wall of separation was never intended to be built so high and so wide as to exclude the non-sectarian recognition of God in public transactions and exercises inclusive of which is bible reading, without comment, and the repeating of the Lord's Prayer by students, in the public school systems.



The reading of the Bible without comment and the repeating of the Lord's Prayer are not religious exercises, services, or instruction, within either the lay or legal definition of such. The statutes under examination do not compare with the definitions. The statutes do not require or for that matter, even permit the essential elements of, comment, demonstration, examination or meaningful manifestation. They are completely void of such. The very elements necessary to reflect a religious service or the giving of religious instruction are lacking.

Nor do the practices complained of violate Appellants' freedom of conscience and their religious liberty. Their argument to the contrary, fallaciously assumes that "freedom of conscience" and "religious liberty" are identical legal concepts, of course they are not.

## **ARGUMENT**

### **POINT I**

Appellee, Board of Education of the Borough of Hawthorne incorporates herein by reference and makes a part hereof the entire argument set forth in Appellee's statement opposing jurisdiction and motion to dismiss or affirm, filed in the cause and which is designated as No. 556, October Term, 1950.

On March 2, 1951, Appellee Board of Education of the Borough of Hawthorne, together with Appellee, the State of New Jersey, filed a statement opposing jurisdiction and a motion to dismiss or affirm, with the Clerk of the United States Supreme Court.

On March 12, 1951, Appellees received notice that the United States Supreme Court had postponed further con-

sideration of the question of the jurisdiction of the Court and of the motion to dismiss or affirm, to the time of the hearing of the cause on the merits.

Appellee Board of Education of the Borough of Hawthorne, therefore, vigorously presses this point as the first point of its argument, herein.

## POINT II

**Non-sectarian recognition of God by the State in public transactions and exercises is not prohibited by the First and Fourteenth Amendments to the Constitution of the United States.**

The First Amendment to the Constitution of the United States, as made applicable to the States by the Fourteenth Amendment (*Everson v. Board of Education*, 330 U. S. 1, 8, 91 L. Ed. 711, 719, 67 S. Ct. 504 (1947); *McCullum v. Board of Education*, 333 U. S. 203, 210, 92 L. Ed. 649, 658, 68 S. Ct. 461 (1948)), prohibits any aid to, or support of, churches, religious sects, denominations, creeds, doctrines, tenets, dogmas and modes of worship of any church or sect, but does not prohibit government recognition of God in public transactions or exercises.

Recognition by the State of belief in God by the people is not repugnant to any constitutional guaranties of freedom of conscience, freedom of worship, free pursuit of religious beliefs, or freedom from religion. *Lewis v. Board of Education*, 157 Misc. 520, 285 N. Y. S. 164 (1935), modified in other respects in (1935), 247 App. Div. 106, 286 N. Y. S. 174, rehearing denied in (1936) 247 App. Div. 873, 288 N. Y. S. 751, appeal dismissed in (1937) 276 N. Y. 490, 12 N. E. (2d) 172.

At the time of the adoption of the Constitution of the United States and the First Amendment thereof, the general, if not the universal, sentiment in America was that a solemn recognition of a superintending Providence in public transactions and exercises is not contrary to the American philosophy of government.

The Mayflower Compact (signed in 1620 in the cabin of the Mayflower), which John Quincy Adams called "the only instance in human history of that positive, original social compact which speculative philosophers have imagined as the only legitimate source of government . . . a unanimous and personal assent by all the individuals of the community" (The American Canon, by Daniel L. Marsh, President of Boston University, published in 1939, by Abingdon Press, New York, p. 18), was made "in the name of God" and it declared that the Colony of which it was the instrument of government was founded "for the glory of God" (American Canon, p. 126).

The Declaration of Independence, which is one of those "organic utterances" which "speak the voice of the entire people" *Church of Holy Trinity v. United States*, 143 U. S. 457, 470, 36 L. Ed. 226, 232 (U. S. Sup., 1892), and which is the organic utterance which made us a nation, completely dispells any notion that State recognition of God is not imbedded in our whole concept or philosophy of government. It mentions God four times. In the first paragraph, it declares that it has become necessary for the people of the colonies "to assume among the powers of the earth the separate and equal station to which the laws of Nature and of Nature's God entitle them," thus basing their action upon the laws of God. In the second paragraph, it is recognized that our liberties were derived from God, who "endowed" all men "with certain unalienable Rights; that among these are Life, Liberty and the pursuit of Happiness." In the last paragraph, Congress appeals to God as

the "Supreme Judge of the world for the rectitude of our intentions" in declaring "that these United Colonies are, and of Right ought to be Free and Independent States." Also in the last paragraph, it is stated that the Declaration, which made us a nation, is made "with a firm reliance on the Protection of Divine Providence."

The First Amendment to the Constitution of the United States, when read in the light of the Declaration of Independence, was not intended to prohibit the reading, in public exercises, of the Book which contains the basis for our concept of civil and religious liberty and which sets forth "the Laws . . . of Nature's God," or to prohibit prayer, in public exercises sponsored by government, to the Supreme Being in reliance upon whose protection this nation was created.

In the convention at Philadelphia which drafted the Constitution of the United States, Benjamin Franklin, addressing George Washington, President of the convention, said:

"I have lived, sir, a long time, and the longer I live, the more convincing proofs I see of this truth: That God governs in the affairs of men. And if a sparrow cannot fall to the ground without His notice, is it probable that an empire can rise without His aid?

"We have been assured, sir, in the sacred writings, that 'except the Lord build the House they labor in vain that build it.' I firmly believe this; and I also believe that without His concurring aid we shall succeed in this political building no better than the builders of Babel. We shall be divided by our little partial local interests; our projects will be confounded, and we ourselves shall become a reproach and byword down to future ages. And, what is worse, mankind may hereafter from this unfortunate instance, despair of establishing governments by human wisdom and leave it to chance, war, and conquest.



"I therefore beg leave to move that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the clergy of this city be requested to officiate in that service." (American Canon, p. 43.)

George Washington's Farewell Address to the people of the United States, which is described by some writers as the last will and testament of the Father of his Country to his country, contains the following paragraphs:

"Of all the dispositions and habits, which lead to political prosperity, Religion and Morality are indispensable supports. In vain would that man claim the tribute of Patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of Men and Citizens. The mere Politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connexions with private and public felicity. Let it simply be asked, Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths, which are the instruments of investigation in Courts of Justice? *And let us with caution indulge the supposition, that morality can be maintained without religion.* Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect, *that national morality can prevail in exclusion of religious principle.*

"It is substantially true, that virtue or morality is a *necessary spring of popular government.* The rule, indeed, extends with more or less force to every species of free government. Who, that is a sincere friend to it, can look with indifference upon attempts to shake the foundation of the fabric?"

The third verse of the Star Spangled Banner, our National Anthem, contains the following words:

"Blest with vict'ry and peace, may the heav'n rescued land Praise the Pow'r that hath made and preserv'd us a nation! Then conquer we must, when our cause it is just, And this be our motto: 'In God is our Trust.' "

All our history, from the signing of the Mayflower Compact to the adoption of the First Amendment, and from the adoption of that Amendment to the present time, is replete with evidence that "this is a religious nation." The American "organic utterances" which "speak the voice of the entire people affirm and reaffirm that this is a religious nation," that we, as a nation, believe in God and that our nation was established with a firm reliance on God. *Church of the Holy Trinity, v. United States, supra; Lewis v. Board of Education, supra.*

In Cooley's Constitutional Limitations, Eighth Edition (1927), Volume II, page 974, it is stated that:

"But while thus careful to establish, protect, and defend religious freedom and equality, the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper infinite and dependent beings. Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the great Governor of the Universe, and of acknowledging with thanksgiving His boundless favors, of bowing in contrition when visited with the penalties of His broken laws. No principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encouraged by a general exemption of the houses of religious worship from taxation for the support of State government."

The oath of allegiance of those required by law to give assurance of fidelity and attachment to the Government of New Jersey ends with the words "*So help me God,*" (R.S. 41:1-1.) The oath required of public officers terminates the same way (R.S. 41:1-3). These oaths are taken with hand on the scriptures (R.S. 41:1-4) and with uplifted hand and "*swearing by the ever-living God*" (R. S. 41:1-5). In order to dispense with the necessity of an oath a person must allege that he is conscientiously scrupulous of taking an oath and it must appear that the person is one entitled by law to affirm in lieu of an oath.

*State v. Harris*, 7 N. J. L. 361 (N. J. Sup., 1800);

*State v. Fox*, 9 N. J. L. 244 (N. J. Sup., 1827).

The rare exception is therefor the affirmation and even here one of the alternatives mentions the "presence of *Almighty God*." (R.S. 41:1-6.)

The oaths required of Court officers and witnesses refer to the presence of "*Almighty God*" (except for the rare case of affirmation) Cf. R.S. 2:32-111; 2:32-114.

The statutes, definitions, and the First Amendment itself above referred to clearly disclose the recognition of the fact that in its entirety our nation is one composed of "God fearing people" and predominantly a "believing" nation with respect to a Supreme Being.

An examination of the authorities reveals that the State of Pennsylvania has a statute akin to the statutes of New Jersey. That particular statute known as the Act of May 20, 1913, Pennsylvania Public Laws 226, states under Section 1:

"Be it enacted that at least 10 verses from the Holy Bible shall be read or caused to be read without comment at the opening of each and every public school upon each and every school day by the teacher in charge."



It was determined that this statute was enacted by the Legislature in the interest of good moral training and of good citizenship to bring to the attention of public school children the fundamental lessons of morality. This particular premise received early recognition in the case of *Commonwealth v. Wolff*, 3 S. & R. 48, wherein the Court said:

"Laws cannot be administered in any civilized government unless the people are taught to revere the sancity of an oath and look to a future state of rewards and punishments for the deeds of this life."

Such legislative thinking makes it more obvious that the statutes such as those in question were not promulgated and passed specifically with religious intent but on the contrary were passed with the thought of *basically inculcating good citizenship and good moral training*.

That we are fundamentally a religious people, is beyond dispute. An excellent review of the American organic utterances which speak the voice of the entire people, and which affirm and re-affirm that this is a religious nation, appears in *Church of the Holy Trinity v. United States*, 143 U. S. 457.

The pertinent excerpts of this momentous decision were recognized and incorporated in the memorandum of Decision of the New Jersey Superior Court, Law Division, by *DAVIDSON, J.*, filed February 23, 1950, which Appellee Board of Education of the Borough of Hawthorne, incorporates herein by reference and makes a part hereof. (R9-15) Through such thorough historical analysis it becomes most obvious that the Congress which submitted the Constitutional Amendments to the people, and the very people themselves in adopting the amendments, never intended the prohibition of nonsectarian recognition of God by the State in public transactions.



In the *Everson* case Justice BLACK said that "these words of the First Amendment reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out." Continuing, he said that whether the New Jersey law authorizing use of public funds for transportation of children to private schools, including sectarian schools, "is one respecting an 'establishment of religion' requires an understanding of the meaning of that language" and, therefore, he deems "it is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted." (330 U. S. 8)

His review of that period (330 U. S. 8 to 13, incl.) shows that the following were the evils which were intended to be stamped out by the First Amendment: "Bondage of laws which compelled them to support and attend *government favored churches*." "Turmoil, civil strife, and persecutions, generated in large part by *established sects*" (300 U. S. 8). "Power of government supporting" *sects*. "In efforts to force loyalty to whatever *religious group* happened to be on top and *in league with the government* of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed." Those punishments had been inflicted for "such things as speaking disrespectfully of the views of ministers of *government-established churches*, non-attendance at those churches, expressions of non-belief in *their doctrines*, and failure to pay taxes and tithes to support them" (330 U. S. 9). Compulsion "to pay tithes and taxes to support *government-sponsored churches*, whose ministers preached inflammatory sermons designed to strengthen and consolidate the *established faith* by generating a burning hatred against dissenters" (330 U. S. 10).

Justice BLACK concludes this list of evils, intended to be stamped out by the First Amendment, with the statement that:

"These practices became so commonplace as to shock the freedom-loving colonists into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. *It was these feelings which found expression in the First Amendment.*" (330 U. S. 11).

Every one of the evils recited by Justice BLACK arose from government aid to "religious groups \* \* \* in league with the government," "churches," "sects," "established faiths" and "doctrines." Not one of them arose from non-sectarian recognition of God by government "in public transactions and exercises," such as "opening legislative sessions with prayer or the reading of the Scriptures."

*Cooley's Constitutional Limitations*, Eighth Edition (1927), Volume II, pages 974-975.

Justice BLACK cited (330 U. S. 15, note 21) the case of *Reuben Quick Bear v. Leupp* (*supra*), 210 U. S. 50, in which it was indicated that "the government is necessarily *und denominational* as it cannot make any law respecting an establishment of religion." He also cited (330 U. S. 15, note 21) the case of *Davis v. Beason* (*supra*), 133 U. S. 333, in which it was said that "the First Amendment was intended \* \* \* to prohibit legislation for support of any religious *tenets*, or the modes of worship of any *sect*."

Every session of Congress, from the First Congress to the present Congress, has been convened with prayer.

James Madison was a member of the congressional committee which planned the chaplain system of Congress.

Reports of Committees of the House of Representatives, Vol. II, No. 124.

The First Congress passed an act for the raising of a regiment of troops, which provided for the appointment and pay of a regimental chaplain.

Act of March 3, 1791, 1st Congress, 3rd Sess., 1 Stat. 222.

Non-sectarian recognition of God by government in the United States, from time immemorial, not only in "organic utterances" which "speak the voice of the entire people," and usages and customs of the people, but by legislation adopted by the First Congress and by State Constitutional provisions, as well as continuous practical construction given to the First Amendment by Congress and the Chief Executive for over a century and a half, is conclusive that the authors of the Bill of Rights had no intention to prohibit non-sectarian recognition of God by the State. There was "no intention of disregarding" such recognition of God as an exception to the First Amendment, "which continued," in law and in practice, "to be recognized as if" it "had been formally expressed."

Such statutes as those under examination are but a governmental recognition of a Supreme Being and are predicated upon the desire to create and perpetuate a sense of good moral being for the benefit of the majority, and thus obviously do the greatest good for the greatest number. It certainly was not the intention of our Constitutional framers that narrow construction be given to the Constitution or any of its amendments, in such matters, especially where the Constitution itself is predicated upon the theory of "the most good for the most people."

### POINT III

The reading of the Bible and the reciting of the Lord's Prayer in the public school systems are not religious services and exercises, and religious instruction contrary to or within the contemplation of the First and Fourteenth Amendments of the United States Constitution.

The word "religion" as used in the constitutional sense, means a particular system of faith and worship, recognized and practiced by a particular church, sect or denomination. It is a term referring to one's views of his relations to his Creator and to the obligations they impose of reverence for His being and character and of obedience to His will. The term is often confounded with a "cultus" or form of worship of a particular sect, but is to be distinguished from the latter. *Reynolds v. U. S.*, 98 U. S. 149, 25 L. Ed. 244; *Davis v. Beason*, 133 U. S. 333, 10 Sup. Ct. 299, 33 L. Ed. 637; *Board of Education v. Minor*, 23 Ohio St., 241, 13 Am. Rep., 233; *Taylor v. State*, 11 So. 2d 663; *Gabrielli v. Knickerbocker*, 82 P. 2d 391.

The term "religious instruction" supposes the furnishing of an outline, reading of papers, setting of examinations and determining credit to be given for the study of historical, biographical, narrative and literary features of the Bible. *State v. Frazier*, 173 P. 35, 102 Wash. 369, L. R. A. 1918 F. 1056.

Through the very wording of the State statutes under examination, it is obvious that the intent and spirit of the legislature of the State of New Jersey was to avoid that which may be definitively called an "exercise," "service" or an "instruction in religion."

To constitute a "service," the statutes would have compelled the use of a sectarian version of the Bible. One



teaching a particular dogma of a sect. The statutes would have compelled definite, overt, participatory acts, required of the students assembled. Specific, meaningful manifestations, would have been required, commanding the student's response to an arranged religious pattern.

To constitute "religious instruction" the statutes would have made provision for the explanation of the biblical passages read. Specific comment thereon, would be in order. Overt demonstration, to inculcate and impress a particular dogma or belief would be necessary. Objective and subjective approaches to the matter would of necessity be a part of such instruction.

Of all this the Statutes are completely void. The very elements necessary to reflect a religious service or a religious instruction are lacking.

As to that particular statute, New Jersey Revised Statutes 18:14-78, which prohibits any "religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer \* \* \*," it is most obvious that the New Jersey Legislature recognized that the reading of the Bible, and the repeating of the Lord's Prayer, were in themselves void of the elements of a religious exercise, or the giving of religious instruction, that they were specifically excluded from other religious manifestations that would smack of religious exercise and instruction. The Legislature impliedly stated "No religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer (which of themselves by their very nature are neither a religious service or exercise but rather a governmental recognition of a Supreme Being) shall be held in any school etc. \* \* \*"

To teach, it is necessary to impart knowledge or information by means of lessons; give instruction to. Thus teaching of religion, in its generally accepted meaning,

would require an imparting of knowledge of religious tenets, dogma and creed. It would demand a giving of specific instruction of a tenet, dogma or creed. A mere reading from the Bible, particularly without comment, therefore cannot be called sectarian teaching.

Teaching, or serious endeavor to inculcate a religion, or concept thereof, through the mere reading of a passage or scripture, is highly improbable. Religion is far too complex. It is one of the most complex and actually least understood subjects in the world today. It is certainly the least definite. Thus if religion be so complex, how then can it be insisted that a particular dogma or creed can be inculcated in one's mind, even the most receptive mind, through a limited reading of a biblical passage, without any comment thereon.

So generally common is the connotation of Bible reading, without comment, and the repeating of the Lord's Prayer, that Appellees believe this Court can take judicial notice that such are not religious exercises in themselves.

#### POINT IV

**Bible reading and the recital of the Lord's Prayer in the public schools of New Jersey do not infringe plaintiff's freedom of conscience nor violate the concept of religious liberty.**

In effect appellants argue that the practices complained of constitute a violation of their freedom of conscience and consequently, of their religious liberty. This is, of course, the standard argument of those who are opposed to organized religion. The fundamental error in this argument is in the fallacious assumption that *freedom of conscience* (freedom to believe) and *religious liberty* (freedom to act) are identical legal concepts. They are different. Freedom

of conscience embraces the right to hold particular religious convictions whereas religious liberty involves the right to act in accordance with religious beliefs.

Freedom of conscience is absolute insofar as the State is concerned, but religious liberty is relative, since the rights of other members of society must be considered. The Mormons believe in polygamy but under the Constitution they cannot practice it.

That this is the proper approach is demonstrated by the language of Mr. Justice BLACK and Mr. Justice DOUGLAS in their concurring opinion in *Barnette v. West Virginia*, *supra*. They said at page 643:

"No well ordered society can leave to individuals an absolute right to make final decisions, unassailable by the State, as to everything they will do or will not do. The First Amendment does not go that far."

The case of *Hamilton v. University of California*, 293 U. S. 245 (U. S. Sup., 1934) is particularly apropos on this point. In that case the appellants, who had a conscientious objection to war and all matters relating to it, claimed exemption from the required Reserve Officers Training Corps training at the University. Mr. Justice CARDOZO in his concurring opinion made the following observation at page 268:

"The conscientious objector, if his liberties were to be thus extended might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never been so exalted above the powers and compulsions of the agencies of government."

That decision demonstrates clearly that freedom of conscience and religious liberty are not the same thing. Ob-

viously and admittedly participation in the military training course was counter to the conscientious beliefs of the objectors. Therefore, the decision was based not on that, but on the "religious liberty" of the objector, i.e., the exercise of religious belief. This latter involves the interest of the State as distinguished from the absolute freedom of conscience of the individual.

In the *Barnette* case, *supra*, Mr. Justice FRANKFURTER said in his dissenting opinion (page 659):

"... the religious consciences of some parents may rebel at the absence of bible reading in the schools."

In the case at Bar, the very fact that the State of New Jersey is an active participant demonstrates that it is representing "society" in the matter. The Legislature is, in the last analysis, the formulator of the public policy of the State and in that capacity it has seen fit to adopt the two statutes here under attack. They have been on the books for many, many years without challenge (1903-1916). They have over that long period of time been accepted by society as being in conformity with the basic law of the land, the Constitutions—both Federal and State.

A decision for the appellants in this case would of necessity mean that this Court feels *religious liberty* (freedom to act) has the same absolute quality as *freedom of conscience* (freedom to believe). In view of the above discussion, we urge that that is not the fact.

## CONCLUSION

In *abstractum*, the sum and substance of Appellants' contention and argument, is that the reading of the Old Testament of the Holy Bible, without comment, and the repeating of the Lord's Prayer, in the public school classrooms, infringes their constitutional rights.



It is all too apparent that Appellants have concerned themselves with their interpretation of the constitutional rights of the individual and have overlooked, perhaps conveniently, the obligations of the individual respecting these rights particularly as to others.

These constitutional freedoms are approached in a favorable light in justification of an alleged personal freedom, and again, these very freedoms and guarantees are conveniently ignored and denied to others who seek to avail themselves of the general application and meaning of such liberties.

The wall of separation of Church and State, as generally defined, accepted and understood, is altered, in part, to conform with an individualistic thought. Through strained and rather limited presentation of such thought, the wall is made to separate that which was not intended to be separated.

With respect to education, the wall of separation prevented the expenditure of public funds for the establishment, maintenance and support of religious schools, and to further prevent religious instruction, in the strict sense, from being given in the public schools. It was never intended to prevent the recognition of a Superior Being; for such recognition does not constitute religious instruction, but is rather a tolerant recognition, of a supreme or superior force, adhered to in belief by the majority of the peoples of this great nation.

Surely the wall of separation metaphor has great merit, but the wall should not be built so as to shut out the light of reason. Perhaps it may be said that the wall of separation casts shadows in the direction of governmental recognition of a Supreme Being; but are not public safety and morals endangered if we remove all of that which purports to be religious?

Can it not be said that the building of the wall of separation, so high and so wide as to negate the slight governmental recognition of a Supreme Being, and further prevent the reading of the Bible, without comment, in the public school systems, is an admission of Atheism as against Theism. Are not those who believe in some sort of Superior Force and Supreme Being, anthropomorphic or otherwise, being denied of their Constitutional rights, in a nation so christian in character, as ours. Appellants basically seek to deny the majority of peoples the right of governmental recognition of a Supreme Being. For if such recognition be wrong in the public school systems, it is most certainly so in every other public aspect. If it be denied in the public school systems, it most certainly should be denied in every other public function.

It is therefore, respectfully submitted that New Jersey Revised Statutes 18:14-77 and 18:14-78 are Constitutional, that appellants herein have no standing to press their claims and that the judgment of the New Jersey Supreme Court should be affirmed.

Respectfully submitted,

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**IN THE**

**Supreme Court of the United States**

**No. 9. OCTOBER TERM, 1951.**

**DONALD R. DOREMUS and ANNA E. KLEIN,**

*Appellants,*

**vs.**

**BOARD OF EDUCATION OF THE BOROUGH  
OF HAWTHORNE and THE STATE OF NEW  
JERSEY,**

*Appellees.*

**ON APPEAL FROM THE SUPREME COURT OF THE  
STATE OF NEW JERSEY.**

**BRIEF FOR APPELLEE  
STATE OF NEW JERSEY.**

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New Jersey.*

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IN THE  
**Supreme Court of the United States**

No. 9. OCTOBER TERM, 1951.

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**DONALD R. DOREMUS and ANNA E. KLEIN,**  
*Appellants,*

*vs.*

**BOARD OF EDUCATION OF THE BOROUGH  
OF HAWTHORNE and THE STATE OF NEW  
JERSEY,**

*Appellees:*

---

**ON APPEAL FROM THE SUPREME COURT OF THE  
STATE OF NEW JERSEY.**

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**BRIEF FOR APPELLEE  
STATE OF NEW JERSEY.**

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**OPINIONS BELOW.**

The opinion of the Supreme Court of the State of New Jersey (R-23-38) is reported at 5 N. J. 435, 75 A. (2d) 880. This opinion affirmed a decision of the Superior Court of the State of New Jersey, Law Division, whose opinion (R-7-20) is reported in 7 N. J. Super. 442, 71 A. (2d) 732.



## JURISDICTION.

The judgment and mandate of the Supreme Court of New Jersey was entered on October 16, 1950 (R-21). An order allowing appeal to the Supreme Court of the United States was made by Mr. Justice Burton on January 12, 1951, and filed January 19, 1951 (R-38). A Statement as to Jurisdiction having been filed with this Court in accordance with Rule 12, on March 12, 1951, this Court made its order in which further consideration of the question of jurisdiction of this Court and of the motion to dismiss or affirm was postponed to the hearing of the case on the merits (R-43).

## STATUTES INVOLVED.

The statutes involved are Revised Statutes of New Jersey (1937) 18:14-77 and 18:14-78.

R. S. 18:14-77 provides:

"At least five verses taken from that portion of the Holy Bible known as the Old Testament shall be read, or caused to be read, without comment, in each public school classroom, in the presence of the pupils therein assembled, by the teacher in charge, at the opening of school upon every school day, unless there is a general assemblage of the classes at the opening of the school on any school day, in which event the reading shall be done, or caused to be done, by the principal or teacher in charge of the assemblage and in the presence of the classes so assembled."

R. S. 18:14-78 provides:

"No religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools."

The First Amendment to the United States Constitution provides in part:

I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; \* \* \*"

The Fourteenth Amendment to the United States Constitution provides in part:

XIV. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of Life, Liberty, or Property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

#### COUNTER-STATEMENT OF QUESTIONS INVOLVED.

1. Have Appellants in this cause suffered injury sufficient to permit them to maintain this action and, if so, are they estopped by their acquiescence in the practices complained of?

2. Is the New Jersey Statute R. S. 18:14-77 providing for the reading, without comment, of verses from that portion of the Holy Bible known as the Old Testament in the public schools of this State constitutional under the First and Fourteenth Amendments of the United States Constitution when the pupils are permitted to be excused from the classroom during said reading upon request?

3. Is the New Jersey Statute R. S. 18:14-78 permitting the repeating of the Lord's Prayer in the public schools of this State constitutional under the First and Fourteenth Amendments of the United States Constitution when the

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Pupils are permitted to be excused from the classroom during such repetition upon request?

### COUNTER-STATEMENT OF FACTS.

The statement of facts set forth in appellants' brief (Ab-4) is substantially correct. However, appellee State of New Jersey brings to the Court's attention the fact that the daughter of appellant, Anna E. Klein, is no longer a student in the public schools of the appellee, she having graduated therefrom.

Appellee State of New Jersey stresses that the question of constitutionality under the First and Fourteenth Amendments of the United States Constitution was not the sole issue below, but appellees jointly argued that the appellants were without legal standing to press their claim; that appellants were estopped; that appellants had waived their rights; and that the long existence of the statutes in question, without challenge, had established their validity. In fact, the New Jersey Supreme Court, speaking through CASE, J., stated that the points had substance but the Court nevertheless concluded to dispose of the appeal on its merits. (R. 24-25.)

### ARGUMENT.

#### POINT I.

Appellants, by their actions, have estopped themselves and waived their right to question the constitutionality of the statutes under examination.

A person may by his acts, or omissions to act, waive a right which he might otherwise have under the provisions of a constitution. Where such acts, or omissions, have intervened, a law will be sustained which otherwise might have been held invalid if the party making the objections

*had not by prior acts precluded himself from being heard in opposition.* Thus, a person who has acquiesced in the proceedings under a statute may not question its constitutionality.

The statutes now for the first time under attack have been on the books of the State of New Jersey in substantially the same form for the past 35 years and 48 years, respectively. In all that time, so far as we have been able to ascertain, neither the present plaintiffs nor anyone else has ever attacked them.

It is admitted in the facts of the case at Bar (Ab-4) that neither the parents nor the daughter has ever asked to be excused while the school authorities were dutifully complying with the statutes under examination but, on the contrary, the daughter participated and was present at such compliance with the statutes on each and every school day when she was not absent for other reasons. In fact, and by inference, the injury, damage or harm that is allegedly being done must either be decidedly minimum and of no consequence, or nonexistent because the student through her own acquiescence and that of the parent actively participated in that portion of the school day's work.

## POINT II.

**Neither the First Amendment nor the Fourteenth Amendment was ever intended to forbid recognition by the State of religion or the Deity, as opposed to State insistence on sectarian religious education.**

The preamble of the New Jersey Constitution of 1844 reads as follows:

*"We, the people of the State of New Jersey, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations, do ordain and establish this constitution:"*  
(Italics ours.)



This preamble has been carried over into the Constitution of 1947.

The Fourteenth Amendment to the United States Constitution was adopted by the requisite number of States and became a part of that constitution in the year 1868. Under the Tenth Amendment to the Federal Constitution all powers not delegated to the United States by the Constitution or prohibited by it to the States are reserved to the States respectively or to the people. When the Fourteenth Amendment was adopted in 1868 the drafters of the Amendment must have contemplated and been aware of the New Jersey Constitution of 1844 and similar State Constitutions then in existence and therefore recognized that the State of New Jersey and the other States were and are in fact composed of religious peoples. Therefore, any prohibition contemplated by the Fourteenth Amendment must be directed not against religion as such but against sectarianism or the preference of one religious sect over another. In none of the cases decided by the various State courts has it been determined that Bible reading constitutes sectarianism.

The consciousness of the drafters of the Fourteenth Amendment, to the reference made to a Supreme Being in the New Jersey Preamble would have specifically necessitated mention by them of a prohibition against religion if they had meant to prevent the States from indulging in anything but the establishment of a State Church or the preference of one or more sects over others.

That this is the proper view is clearly demonstrated by the language of one historian who wrote on the subject 115 years ago, not long after the adoption of the First Amendment. In discussing the meaning attributed to that Amendment by James Madison, one of our founding fathers, he said:

"Mr. Madison said he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner con-

trary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the Constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the Constitution, and the laws made under it, enable them (sic) to make laws of such a nature as might infringe the rights of conscience and establish a national religion; to prevent these effects he presumed the amendment was intended, and he thought it was as well expressed as the nature of the language would admit."

III. Jonathan Elliott—The Debates in Several State Conventions on the Adoption of the Federal Constitution (1836), page 730.

And at page 731 of the same work:

"Mr. Madison thought, if the word 'national' was inserted before religion, it would satisfy the minds of (the) honorable gentlemen. He believed that the people *feared one sect might obtain a pre-eminence*, or two combine together, and establish a religion to which they would compel others to conform. He thought if the word 'national' was introduced, it would appoint the amendment directly to the object it was intended to prevent." (Italics ours.)

The same author states that Benjamin Huntington, of Rhode Island, expressed fear that the First Amendment would be harmful to religion and expressed his wish that "the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all." (Pages 730 and 731.)

When read together, R. S. 18:14-77 and R. S. 18:14-78 express the true meaning and intent of the First Amendment to the Constitution of the United States. They pro-

vide for that kind of recognition of God in the opening exercises of the public schools which does not involve sectarianism, namely, the reading of the Old Testament, without comment, and the repeating of the Lord's Prayer, but prohibit any sectarianism in public schools, namely; any other religious service or exercise. This completely eliminates doctrine, creed, dogma and every other phase of sectarianism. In fact, these statutes, by providing for the reading of the Bible, *without comment*, and the repeating of the Lord's Prayer, contain a lesser element of recognition of God than the preamble of the New Jersey Constitution of 1844 (included in the 1947 Constitution without change), which recognizes "Almighty God" as the One who has so long permitted us to enjoy civil and religious liberty. It is self-evident that, if the New Jersey Legislature was without power to enact R. S. 18:14-77 and R. S. 18:14-78, then the people of New Jersey had no right to include an even greater recognition of God in their State Constitution, which recognition of "Almighty God" appears again in Article I, paragraph 3, of the New Jersey Constitution. The First Amendment to the Constitution of the United States, as made applicable to the States by the Fourteenth Amendment, does not, and was never intended to, prohibit the State recognition of God contained in the challenged statutes and the New Jersey Constitution.

There is a wealth of authority to the effect that the Bible is not a sectarian book, that it is read in the schools to inculcate fundamental morality, and that a statute authorizing the reading of the Bible, particularly the Old Testament, without comment, in the opening exercises of public schools, is not a law authorizing an unconstitutional use of tax-supported school property and the tax-supported school system, and is not a law respecting an establishment of religion, or prohibiting the free exercise thereof: *Vidal vs. Girard's Executors* (1844), 2 How. 127, 11 L. Ed. 205; at 200; *Donahoe vs. Richards* (1854), 38 Me. 379, 61 Am. Dec. 256; *Com. ex rel Wall vs. Cooke* (1859) 7 Am. L. Reg. (Mass.) 417; *Soiller vs. Woburn* (1866), 94 Mass. 127;

*Moore vs. Monroe* (1884), 64 Iowa 367, 20 N. W. 475, 52 Am. Rep. 444; *Hart vs. School Dist.* (1885), 2 Lane. Law Rev. (Pa.) 342; *North vs. University of Illinois* (1891), 137 Ill. 296, 27 N. E. 54; *Nesle vs. Hum* (1894), 1 Ohio N. P. 140; 2 Ohio S. & C. P. Dec. 60; *Pfeiffer vs. Board of Education* (1898), 118 Mich. 560, 77 N. W. 250, 42 L. R. A. 536; *Curran vs. White* (1898), 22 Pa. Co. Ct. 201; *Stevenson vs. Hanyon* (1898), 7 Pa. Dist. R. 585; *State ex rel Freeman vs. Scheve* (1902), 65 Neb. 853, 91 N. W. 846, 59 L. R. A. 927, Motion for rehearing overruled in (1903); 65 Neb. 876, 93 N. W. 169, 59 L. R. A. 932; *Billard vs. Board of Education* (1904); 69 Kan. 53, 76 Pac. 422, 68 L. R. A. 166, 105 Am. St. Rep. 148, 2 Ann. Cas. 521; *Hackett vs. Brooksville Graded School Dist.* (1905), 120 Ky. 608, 87 S. W. 792, 69 A. L. R. 592, 117 Am. St. Rep. 599, 9 Ann. Cas. 36; *Church vs. Bullock* (1908), 104 Tex. 1, 109 S. W. 115, 16 A. L. R. (N. S.) 860; *Herald vs. Parish Bd.* (1915), 136 La. 1034, 68 So. 116, L. R. A. 1915D 941, Ann. Cas. 1916A 806; *Knowlton vs. Baumhover* (Iowa Supreme Ct., 1918), 182 Iowa 691, 166 N. W. 202, 5 A. L. R. 841, at 857; *Wilkerson vs. City of Rome* (1922), 152 Ga. 762, 110 S. E. 895, 20 A. L. R. 1334; *People ex rel. Vollmar vs. Stanley* (1927), 81 Colo. 276, 255 P. 610; *Kaplan vs. Independent School Dist.* (1927), 171 Minn. 142, 214 N. W. 18, 57 A. L. R. 185; *Lewis vs. Board of Education* (1935), 157 Misc. 520, 285 N. Y. S. 164, modified in other respects in (1936) 247 App. Div. 106, 286 N. Y. S. 174, rehearing denied in (1936), 247 App. Div. 873, 286 N. Y. S. 751, Appeal dismissed in (1937) 276 N. Y. 490, 12 N. E. (2d) 172; 16 C. J. S. 604, sec. 206, notes 87, 88; 12 Corpus Juris 943, sec. 451, note 69; 47 American Jurisprudence 499, sec. 209, notes 16, 17, 18, 452, sec. 213, notes 2, 3; 16 L. R. A. (N. S.) 861; 5 A. L. R. 866; 141 A. L. R. 1145; 105 Am. St. Rep. 153; 2 Ann. Cas. 522; 19 Ann. Cas. 234; Ann. Cas. 1916A 812.

The same is true of the repeating of the Lord's Prayer in the opening exercises of public schools. *Moore vs. Monroe*, *supra*; *Billard vs. Board of Education*, *supra*; *Hackett vs. Brooksville Grade School District*, *supra*; *Church vs. Bullock*, *supra*; 47 American Jurisprudence 450, sec. 210, notes 7, 8; 47 American Jurisprudence 453, sec. 213, note 3.



The Court's attention is particularly called to the case of *Lewis vs. Board of Education, supra* (in which an appeal was dismissed by the New York Court of Appeals, 276 N. Y. 490, 12 N. E. (2d) 172 (N. Y. Ct. App., 1937)).

The Court below (N. Y. Sup.) said (285 N. Y. S. 164, at 167):

"Undisguised, the plaintiff's attack is on a belief and trust in God and in any system or policy or teaching which enhances or fosters or countenances or even recognizes that belief and trust. Such belief and trust, however, regardless of one's own belief, has received recognition in State and judicial documents from the earliest days of our republic."

The Bible itself is not a sectarian book. *Evans vs. Selma Union High School, District of Fresno County*, 193 Cal. 54, 222 P. 801, 802, 31 A. L. R. 1,121. (S. C., Cal. 1924.) To be sectarian, a book must teach the peculiar dogma of a sect as such and it is not so merely because it is so comprehensive as to include dogma by the interpretation of its readers. It must be a most limited version bespeaking only the limited creeds of a given sect. Nor is a book sectarian merely because it was edited or compiled by those of a particular sect. It is not the authorship or the mechanical composition of the book, nor the use of it, but its contents, that give it its character. The question is not whether the version of the Bible used is canonical or apocryphal. Neither the King James translation of the Bible nor the Douay version of the Bible are sectarian books and the reading thereof without comment, in the public schools, does not constitute sectarian instruction. *Hackett vs. Brooksville Graded School District*, 120 Ky. 608, 87 S. W. 792, 69 L. R. A. 592, 117 Ann. St. Rep. 599, 9 Ann. Cas. 36 (Ky. S. C., 1905).

A prayer, offered at the opening of a public school for the aid and presence of the Heavenly Father, during the day's work, asking for wisdom, patience, mutual love and respect, looking forward to a heavenly reunion after death

and concluding in Christ's name, is not "sectarian," for a form of prayer, not authorized by a particular church is not "sectarian." *Hackett vs. Brooksville Graded School District, supra.*

If such be considered as not being "sectarian," surely, by analogy, a mere reading of the Bible, without comment, particularly a reading from the Old Testament, cannot be so construed. The Bible, not being sectarian, its reading without comment is thus not an expenditure of public money in aid of sectarian purpose. *People vs. Stanley*, 81 Colo. 276, 255 P. 610, 615. (S. C., Colo. 1927.)

### POINT III.

**The challenged statutes contain no compulsory feature.**

There is no evidence in this case that the daughter of the plaintiff, Anna E. Klein, was ever compelled to do anything which infringed upon the religious belief, or disbelief, of herself or her parents, and the activities of the defendant board of education, in obeying said statutes, do not involve any compulsion.

In Cooley's Constitutional Limitations (1929), Eighth Edition, Volume II, page 983, it is stated that:

"Whatever deference the constitution or the laws may require to be paid in some cases to the conscientious scruples or religious convictions of the majority, the general policy always is, to avoid with care any compulsion which infringes on the religious scruples of any, however little reason may seem to others to underlie them. \* \* \*

In *West Virginia State Board of Education vs. Barnette*, 319 U. S. 624, 87 L. Ed. 1628 (U. S. Sup., 1943), the lower court held that:

"We are clearly of the opinion that the regulation of the Board requiring that children salute the flag is void in so far as it applies to children having conscientious objections."

tious scruples against giving such salute and that, as to them, its enforcement should be enjoined," 47 F. Supp. 251, at 255. (D. C., W. Va., 1942.)

In other words that case turned on the *compulsive* feature of the West Virginia Regulation.

Mr. Justice Jackson, who wrote the opinion for the United States Supreme Court in the *Barnette* case, expressed the following views with respect to the compulsive features in that case as follows:

He said (319 U. S. 624) at page 630:

"\* \* \* The cause was submitted on the pleadings to a District Court of three judges. It restrained enforcement as to the plaintiffs and those of that class.  
\* \* \*

and again at page 630:

"The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. \* \* \*

and at page 632:

"\* \* \* In the present case attendance is not optional. \* \* \*

and at page 642:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.  
\* \* \*



In the *Barnette* case the resolution providing "that the salute to the flag become 'a regular part of the program of activities in the public schools,' that all teachers and pupils 'shall be required to participate in the salute \* \* \*; provided, however, that refusal to salute the flag be regarded as an act of insubordination, and shall be dealt with accordingly'" was not declared unconstitutional. The lower Court held merely that it was "void insofar as it applies to children having conscientious scruples against giving such salute and that, as to them, its enforcement should be enjoined." The United States Supreme Court merely affirmed the judgment enjoining enforcement of the resolution as to children having conscientious scruples against giving such salute who were *compelled* to comply. Justice Jackson got to the crux of the whole matter in his statement that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force* citizens to confess by word or act their faith therein" (319 U. S. 642.) He did not say that the State could not provide courses of instruction "for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government" (319 U. S. 325), or provide for the voluntary salute of the flag by the children in public schools.

The challenged statutes, R. S. 18:14-77 and R. S. 18:14-78, providing for the reading of the Old Testament and the saying of the Lord's Prayer in the opening exercises of public schools, thus recognizing God and the system of morality based on a belief in God as set forth in the Old Testament, do not compel or "force citizens to confess by word or act their faith therein." This recognition of God and the system of morality, based upon a belief in God, in "deference \* \* \* to the conscientious scruples or religious convictions of the majority" does not contain any element of "compulsion which infringes on the religious scruples of any." (Cooley's Constitutional Limitations, Volume II, p. 983.)



The statutes involved do not provide for any such compulsion and the regulations of the defendant Board of Education specifically permit any student, so desiring, to be excused from the classroom, upon request to be excused, when the teacher or principal, as the case may be, is dutifully complying with said statutes. (P. 3b-14.)

#### POINT IV.

The New Jersey statutes under attack must be liberally construed in favor of the State of New Jersey since they were enacted pursuant to the police power reserved to the State.

The Appellants, at page 7 of their brief, state that this Court in the *Everson vs. Board of Education* (330 U. S. 1) and *McCullum vs. Board of Education* (339 U. S. 203) cases determined definitively that the restrictions upon Acts of Congress in the First Amendment were made applicable to the States by the Fourteenth Amendment, and that the principles applicable in the case at Bar were involved in those two cases.

We submit that this is a false premise for the simple reason that the principles embodied in the First Amendment could not be made wholly applicable to the States by the Fourteenth Amendment, since there is no Federal police power but there is a police power which has been reserved to the State of New Jersey. The *Everson* and *McCullum* cases, *supra*, involved regulations of the respective boards of education. In the case at Bar, however, the New Jersey Legislature meeting in solemn session as maker of the public policy of New Jersey enacted the statutes pursuant to the police power particularly reserved to the State in the interest of the public morals and public welfare. Hence Appellants' argument is obviously fallacious when based upon the premise that the First Amendment was made applicable to the States by the Fourteenth Amendment.

"Police power is the power inherent in a government to enact laws, within constitutional limits, to promote the order, safety, health, morals and general welfare of society. As applied to the powers of the States of the American Union, the term is also used to denote those inherent governmental powers which, under the Federal system established by the Constitution of the United States, are reserved to the several States."

16 Corpus Juris Secundum, "Constitutional Law,"  
§-174, p. 537.

It is fundamental that no part of the Federal Constitution was intended to hamper a valid exercise of state police regulation. None of the amendments was intended to interfere with the police power of the various States.

Particularly is it established by overwhelming authority that the Fourteenth Amendment was not designed to interfere with, curtail, restrain, destroy or take from the States the right to exercise the police power.

*Louisville & N. R. Co. vs. Melton*, 218 U. S. 36,  
54 L. Ed. 921, 30 S. Ct. 676, 47 L. R. A. (N. S.) 84  
(U. S. Sup., 1909).

*Nebbia vs. New York*, 291 U. S. 502, 78 L. Ed. 940,  
54 S. Ct. 505, 89 A. L. R. 1469 (U. S. Sup., 1933).

*Wilkinson vs. Rahrer*, 140 U. S. 545, 35 L. Ed. 572,  
11 S. Ct. 865 (U. S. Sup., 1890).

*Pacific Gas & Electric Co. vs. Police Ct.*, 251 U. S.  
22, 64 L. Ed. 112, 40 S. Ct. 79 (U. S. Sup., 1919).

*Cunnius vs. Reading School Dist.*, 198 U. S. 458,  
49 L. Ed. 1125, 25 S. Ct. 721, 3 Ann. Cas. 1121  
(U. S. Sup., 1904).

*Terrace vs. Thompson*, 263 U. S. 197, 68 L. Ed. 255,  
44 S. Ct. 15 (U. S. Sup., 1923).

The Fourteenth Amendment does not limit the subjects upon which the police power of a State may be exerted.

*Cunnius vs. Reading School Dist., supra.*

*Brim vs. Jones*, 165 U. S. 180, 41 L. Ed. 677, 17-S. Ct. 282 (U. S. Sup., 1896).

"Police power" means the general power of the government to reserve and promote, among other things, the morals of the community even at the expense of private rights. Pursuant to said power, eleven states, in addition to New Jersey, have enacted statutes requiring the Bible to be read in the public schools: Alabama (1919), Arkansas (1930), Delaware (1915), Florida (1925), Georgia (1921), Idaho (1925), Kentucky (1924), Maine (1923), Massachusetts (1926), Pennsylvania (1913) and Tennessee (1915).

In Arkansas, in the General Election of 1930, an initiative act was approved by the voters which requires the Bible to be read daily, without comment, in the public schools.

Digest of Statutes of Arkansas, 1937, Vol. I, Sec. 3614.

The School Board of the District of Columbia in 1926 adopted a rule requiring the reading of the Bible and the repeating of the Lord's Prayer in the public schools.

By-Laws, Dist. of Columbia Bd. of Ed., Chap. 6, Sec. 4.

As stated by appellants (Ab-16) there are five states which have statutes specifically permitting, but not requiring, the Bible to be read in the public schools.

The North Dakota statute declares that the Bible is not a sectarian book and that it shall not be excluded from any public school.

N. Dakota Rev. Code, 1943, Title 15, Sec. 3812.



A Mississippi statute, though not specifically mentioning Bible reading, requires a suitable course of instruction in the "Principles of Morality and Good Manners," such course to "include what is known as the mosaic ten commandments."

Mississippi Code, 1942, Title 24, Sec. 6672.

There are several states in which the statutes are silent on Bible reading in the schools, but the courts have upheld the practice.

The Bible is read in a large number of schools in many states in which the statutes are silent on Bible reading in the schools.

Data based on reports of State Department of Education of each state, Church-State Relationships (1934), by Alvin W. Johnson, University of Minnesota Press, pp. 289, et seq.

No state has any constitutional or statutory provision specifically prohibiting Bible reading in the public schools.

Separation of Church and State, Johnson and Yost (1948), p. 35.

As far as we can find no statute requiring or permitting the reading of the Bible in the public schools has been declared unconstitutional.

The only South Dakota decision cited by appellants (appellants' brief, 13 fn, 18 fn, 27, 35) is *Finger vs. Weedman*, 226 N. W. 348 (S. Dakota Supreme Ct., 1929). The court in that case, while its opinion is adverse to Bible reading in the schools, did not declare the state statute unconstitutional. It merely compelled the school board to readmit the children who had been expelled for not attending the opening exercises during the reading of the Bible, and



directed the board thereafter to permit them to be excluded from the school room during such exercises. The President Judge and one other judge wrote dissenting opinions. It is interesting to note that in the majority opinion the view is expressed that the public schools can, without opposition, "teach that there is an All-Wise Creator to whom we owe love, reverence, and obedience" (226 N. W. 350), and the court expresses the further view that the Douay version of the Bible and the King James version, "if used to teach morals, the morals of one are as elevating as the other, and there is no substantial difference." (226 N. W. 351.)

Appellants state (Ab-17) that the reading of the Bible in the public schools has been struck down in Ohio, Wisconsin, Illinois and Louisiana.

The Ohio case cited by appellants (Ab-15; 17fn) is *Board of Education vs. Minor*, 23 Ohio St. 211, 13 Am. Rep. 233 (Ohio Supreme Ct., 1872), in which the Board of Education of Cincinnati adopted a rule prohibiting the reading of the Bible in the public schools. The plaintiffs therein, who were taxpayers, filed a bill to enjoin the board from enforcing said rule. There being no legislation on the question, the Court held that the Board could not be compelled to permit the reading of the Bible in the schools. The Court said that it is exclusively within the jurisdiction of the school board to exclude Bible reading. Inferentially the case holds that the school board could direct the reading of the Bible, though the wisdom of doing so is questioned by the Court. In a later case in Ohio the Court held that a regulation of a school board requiring that a portion of the Bible shall be read in the opening exercises in the public schools is not unconstitutional, such regulation being exclusively within the jurisdiction of the school board.

*Nessle vs. Hum*, 1 Ohio N. P. 140, 2 Ohio S. & C. P. 60 (1894).

It is estimated that 85% of the schools in Ohio have Bible reading.

*Church-State Relationships in the United States,*  
Johnson, p. 308.

The Wisconsin case cited by plaintiffs (appellants brief, 13 fn, 17 fn, 22, 30, 36) is *State ex rel. Weiss vs. District Board of Education*, 76 Wis. 177, 44 N. W. 967, 7 L. R. A. 330, 2 Am. St. Rep. 41 (Wis. Sapreme Ct., 1890), in which the court held that use of the Bible as a textbook in the class rooms violated the state constitution. No state law requiring or permitting the reading of the Bible in the schools was involved in the case. The following language contained in the opinion of Judge Lyon is inconsistent with the conclusion reached in the three separate opinions in that case:

"Hence, to teach the existence of a Supreme Being of infinite wisdom, power and goodness, and that it is the highest duty of all men to adore, obey and love Him, is not sectarian, because all religious sects so believe and teach. The instruction becomes sectarian when it goes further and inculcates doctrine or dogma concerning which the religious sects are in conflict.

\* \* \* It should be observed in this connection that the above views do not, as counsel seemed to think they may, banish from the district schools such textbooks as are founded upon the fundamental teachings of the Bible, or which contain extracts therefrom.) \* \* \*

Such textbooks are in the schools for secular instruction and rightly so, and the constitutional prohibition of sectarian instruction does not include them, even though they may contain passages from which some inferences of sectarian doctrine might possibly be drawn. Furthermore, there is much in the Bible which cannot justly be characterized as sectarian. \* \* \* It may also be used to inculcate good morals—that is,

our duties to each other—which may and ought to be inculcated by the district schools. \* \* \* Concerning the fundamental principles of moral ethics, the religious sects do not disagree.” (44 N. W. 973 and 974.)

The only cases decided prior to the *Weiss* case, which could be considered adverse to Bible reading in the public schools were one or two cases holding that a board of education cannot be compelled to cause the Bible to be read in public schools. The Maine, Massachusetts, Illinois, Iowa and Pennsylvania courts had theretofore held that Bible reading in the public schools did not violate any constitutional provision. *Donohoe vs. Richards*, 38 Maine 379, 61 Am. Dec. 256 (1854); *Wall vs. Cooke*, 7 Am. L. Reg. 417 (Mass., 1859); *Spiller vs. Woburn*, 94 Mass. 127 (1866); *McCormick vs. Burt*, 95 Ill. 263, 35 Am. Rep. 163 (1880); *Moore vs. Monroe*, 64 Iowa 367, 20 N. W. 475; 52 Am. Rep. 444 (1884); and *Hart vs. School Dist.*, 2 Lanc. Law Rev. 346 (Penna., 1885).

The court in the *Weiss* case brushed those cases aside (citing some of them) with a statement that the provisions of the constitutions of those states are not similar to the provisions of the Wisconsin constitution, without pointing out the dissimilarities.

The opinion of Judge Cassoday in the *Weiss* case cites and quotes (44 N. W. 978) from the *Girard Will* case (*Vidal vs. Girard Executors*, 2 Howard 127, 11 L. Ed. 205, decided in 1844), but seems to overlook the fact that Mr. Justice Story in that case held that it was sectarianism that was prohibited by Girard's will (which appointed the City of Philadelphia as trustee) and that the Bible is not a sectarian book and that it could be, and should be, taught at Girard College.

See discussion of the *Vidal* case and *Weiss* case in *Hackett vs. Brooksville Graded School Dist.*, 120 Ky. 608, 87 S. W. 792, 795, 797, 69 L. R. A. 592 (Kentucky Ct. of App., 1905).



The *Vidal* case, decided more than 100 years ago, is of utmost importance, not only on the question as to whether the Bible is a sectarian book but because of the court's discussion of the provisions of the Pennsylvania constitution, which Judge Cassoday said in the *Weiss* case are "quite similar" to the provisions of the Wisconsin constitution, although he failed to consider the Pennsylvania case of *Hart vs. School District*, 2 Lanc. Law Rev. 346 (1885), in which an injunction to prevent the reading of the King James version of the Bible in the public schools was denied.

In the *Vidal* case, Justice Story says:

" \* \* \* Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college—its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, *not sectarian*, upon the general evidences of Christianity, from being read and taught in the college by lay teachers? \* \* \* Where are benevolence, the love of truth, sobriety, and industry, so powerfully and irresistibly inculcated as in the sacred volume? \* \* \* All that we can gather from his language is, that he desired to exclude sectarians and sectarianism from the college, leaving the instructors and officers free to teach the purest morality, the love of truth, sobriety, and industry, by all appropriate means; and of course including the best, the surest, and the most impressive." (2 Howard 20, 11 L. Ed. 235.)

This language of one of the most highly respected justices in the history of the Supreme Court is applicable to the case at bar.

The Illinois case cited by appellants (appellants' brief, 13 fn, 17 fn, 22, 23, 26, 30) is *People ex rel. Ring vs. Board of Education*, 245 Ill. 334, 92 N. E. 251, 29 L. R. A. (N. S.) 442, 19 Ann. Cas. 220 (Ill. Supreme Ct., 1910), in which



the court condemned exercises in the public schools consisting of Bible reading, singing of hymns and the repeating of the Lord's Prayer. During the reading from the Bible and the reciting of the Lord's Prayer the pupils were required to rise in their seats, fold their hands and bow their heads, and from time to time certain pupils were asked to explain the meaning of certain passages of the Bible read. No state statute or regulation of the school board was involved in the case. The court's opinion, which is adverse to Bible reading in the public schools, brushes aside without thorough consideration the decisions of the Maine, Massachusetts, Illinois, Iowa, Pennsylvania, Ohio, Michigan, Nebraska, Kansas, Kentucky and Texas courts in which it had theretofore been held that Bible reading in the public schools does not violate any constitutional provisions of those states.

*Donohoe vs. Richards*, supra (Maine); *Wall vs. Cooke*, supra (Mass.); *Spiller vs. Woburn*, supra (Mass.); *McCormick vs. Burt*, supra (Ill.); *Moore vs. Monroe*, supra (Iowa); *Hart vs. School Dist.*, supra (Penna.); *Nessle vs. Hum*, supra (Ohio, 1894); *Pfeiffer vs. Bd. of Ed.*, 118 Michigan 560, 77 N. W. 250 (1898); *Curran vs. White*, 22 Pa. Co. Ct. 201 (1898); *Stevenson vs. Hanyon*, 7 Pa. Dist. Rep. 585 (1898); *Freeman vs. Scheve*, 65 Neb. 876, 93 N. W. 169 (1903); *Billard vs. Bd. of Ed.*, 69 Kansas 53, 76 Pac. 422 (1904); *Hackett vs. Brooksville Graded School Dist.*, 120 Ky. 608, 87 S. W. 792 (1905); and *Church vs. Bullock*, 104 Texas 1, 109 S. W. 115 (1908).

The *Ring* opinion is based upon a short quotation from the Ohio case of *Board of Education vs. Minor*, supra, in which it was held that a school board cannot be compelled to cause the Bible to be read in the public schools, the Wisconsin case of *Weiss vs. District Board*, supra, in which the Bible as a textbook was excluded from the public schools, and the Nebraska case of *Freeman vs. Scheve*, 65 Neb. 853, 91 N. W. 846, 59 L. R. A. 927 (Neb. Supreme Ct., 1902), motion for rehearing overruled 65 Neb. 876, 93 N. W. 169, 59 A. L. R. 932 (1903), the opinion in which, on rehearing, says that the Bible may be read in public schools.

In an excellent dissenting opinion written by two of the judges in the *Ring* case it is demonstrated beyond doubt that the bill of rights in every state constitution was designed to prevent "denominational or sectarian instruction." (92 N. E. 258.) The majority opinion does not cite the United States Supreme Court decision in *Vidal vs. Girard*, supra, which is cited in the dissenting opinion. (92 N. E. 258.) The judges who dissented in the *Ring* case said:

" . . . To hold that the Bible cannot be read in the public schools requires a judicial determination that it teaches the doctrine of some sect, and if that is so we ought to be able to say what sect.

" . . . The Constitution is not directed against the Bible, but applies equally to all forms and phases of religious beliefs. If the Bible is to be excluded because it pertains to a religion and a future state, heathen mythology must go with it. Moral philosophy must be discarded because it reasons of God and immortality, and all literature which mentions a Supreme Being, or intimates any obligations to Him, must be excluded. We cannot conceive that the framers of the Constitution, or the people, intended that the best and most inspiring literature, history, and science should be excluded from the public schools, so that nothing should be left except that which has been sterilized, so as not to interfere with the beliefs or offend the sensibilities of atheists." (92 N. E. 265.)

The decision in the *Ring* case is contrary to a prior decision of the Illinois Court which sustained a rule of the state university requiring students to attend chapel services, consisting of Bible reading, reciting of the Lord's Prayer and occasional non-sectarian talks.

*North vs. University of Illinois*, 137 Ill. 296, 27 N. E. 54 (1891).

Since the decision in the *Ring* case, the Illinois Supreme Court found no objection to the construction by church authorities of a Roman Catholic Chapel on the public premises of the Cook County poor farm.

*Reichwald vs. Catholic Bishop*, 258 Ill. 44, 901 N. E. 266. (1913).

The Louisiana case cited by appellants (appellants' brief, 13 fn, 17 fn, 31) is *Herold vs. Parish Board*, 136 La. 1034, 68 So. 116, L. R. A. 1915D 941, Ann. Cas. 1916A 806 (La. Supreme Ct., 1915), in which a school-board resolution requested the teachers (deemed by the court to be a command) to open sessions of the public schools with readings from the Bible and the Lord's Prayer. The court cited the *Weiss* case as authority to the effect that courts take judicial notice of the contents of the Bible, numerous sects and general doctrines, but did not cite that case as authority for its conclusions. Nor did it cite or rely upon any other case except *Shreveport vs. Levy*, 26 L. Ann. 671, which it cited only as authority to the effect that Jews and Gentiles "must be treated alike." (68 So. 121.) While the court in the *Herold* case declared the resolution unconstitutional, that case does not support the contentions of the appellants in the instant case. It does support the respondent's contention that the reading of the Old Testament in the public schools is not prohibited by any constitutional provision.

The court in the *Herold* case quotes from Story's Commentaries on the Constitution a statement of what he conceived to be the true meaning of the First Amendment. (68 So. 120.) The court concluded that the reading of the New Testament violated the conscience of the Jew and set aside the resolution because, and only because, it provided for reading of both the Old and New Testaments. There can be no doubt that it would have sustained the resolution had it restricted the reading of the Bible to the Old Testament. The court states that our Country is a "godly land" and "we are a religious people" (68 So. 119), that Catholic



children are *not* prohibited by their church "from reading the Bible without authoritative comment" (68 So. 118), that neither Catholic, Protestant or Jew can object to the reading of the Old Testament. The court also says that a Christian, either Catholic or Protestant, can have no objection to the repeating of the Lord's Prayer in the public schools. Nowhere in the opinion does the court say that a Jew can object to such repeating of that prayer, nor can it be successfully demonstrated that any one who believes in God can have any objection to that prayer. It contains not one word relative to Christ or any belief with respect to God which the Jew does not have in common with the Christian. True, it was given to Christians by Christ, but it is addressed to "Our Father which art in heaven." Certainly a Jew can have no objection to that. Throughout the Old Testament Jehovah God is spoken of as the Father of the Jews. The Prayer expresses reverence for God and trust in him (as does the Declaration of Independence) and praise for him (as does the Star Spangled Banner).

Offering a prayer at the beginning of school each day, asking direction and guidance, which does not represent any sect or denomination, is constitutionally unobjectionable.

*Hackett vs. Brooksville Graded School District,*  
supra.

The Nebraska case cited by plaintiffs (appellants' brief, 18 fn, 26, 39) is *State ex rel. Freeman vs. Scheve* (supra), 65 Neb. 853, 91 N. W. 846; 59 L. R. A. 927. Motion for rehearing overruled 65 Neb. 876, 93 N. W. 169, 69 L. R. A. 932 (Neb. Supreme Ct., 1903), in which the court issued a peremptory writ of mandamus to compel a school board to cause a certain teacher to discontinue reading from the Bible, singing certain "sectarian songs," and offering prayer to the Deity, in accordance with the doctrines, beliefs, customs or usages of sectarian churches, during school hours in the presence of the pupils. No state law or regulation of the school board was involved in the case.



The opinion written by Commissioner Ames and concurred in by two other commissioners, in which no cases are cited except the *Weiss* case, supra, is adverse to Bible reading in the public schools. The Court, in a per curiam opinion, directed the issuance of the peremptory writ for the reasons stated in the opinion of Commissioner Ames. Judge Sedgwick concurred "in the conclusion reached by the commissioners solely on the ground that the exercises complained of were 'sectarian instruction' within the meaning of the Constitution." (91 N. W. 848.) Judge Holcomb concurred only insofar as it was held that the exercises "as conducted" (91 N. W. 848) violate the constitution, and said, referring to the opinion of the Commissioners:

" \* \* \* If the views therein expressed are sound, then it would seem that it is in the power of any taxpayer to prevent religious exercises in any of the penal, reformatory, or eleemosynary institutions in the state, and to close the doors of the state capitol to the chaplains of both branches of the legislature. \* \* \* The Bible itself is not a sectarian book, and it is an erroneous conception to so regard it. \* \* \* " (91 N. W. 848.)

On rehearing in the *Freeman* case, the court, in an opinion written by the Chief Justice (65 Neb. 876, 93 N. W. 169, 59 L. R. A. 932) says that the Bible may be read in the public schools:

" \* \* \* The decision does not, however, go to the extent of entirely excluding the Bible from the public schools. It goes only to the extent of denying the right to use it for the purpose of imparting sectarian instruction. \* \* \* Why may not the Bible also be read without indoctrinating children in the creed or dogma of any sect? Its contents are largely historical and moral. Its language is unequalled in purity and elegance. Its style has never been surpassed. Among the classics

of our literature it stands pre-eminent. \* \* \* But the fact that the King James translation *may* be used to inculcate sectarian doctrines affords no presumption that it will be so used. *The law does not forbid the use of the Bible in either version in the public schools.* It is not proscribed either by the Constitution of the statutes, and the courts have no right to declare its use to be unlawful because it is possible or probable that those who are privileged to use it will misuse the privilege by attempting to propagate their own peculiar theological or ecclesiastical views and opinions. \* \* \* The section of the Constitution which provides that 'no sectarian instruction shall be allowed in any school or institution supported, in whole or in part, by the public funds set apart for educational purposes,' cannot, under any canon of construction with which we are acquainted, be held to mean that neither the Bible, nor any part of it, from Genesis to the Revelation, may be read in the educational institutions fostered by the state. \* \* \* (93 N. W. 171, 172.)

Pennsylvania, Ohio and Nebraska should be added to the appellants' list (appellants' brief, 17) of states in which the courts have held that the Bible may be read in the public schools.

*Hart vs. School Dist.* (supra), 2 Lanc. Law Rev. 342 (Pa., 1885);

*Curran vs. White.* (supra), 22 Pa. Co. Ct. 201 (1898);

*Stevenson vs. Hanyon* (supra), 7 Pa. Dist. R. 585 (1898);

*Nessle vs. Hum* (Ohio), supra;

*Freeman vs. Scheve* (Neb.), supra.

In *Moore vs. Monroe* (supra), 64 Iowa 367, 20 N. W. 475 (appellants' brief, 17 fn), Bible reading in the public schools was sustained, notwithstanding the fact that the

Iowa Constitution provides that "The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

Constitution of Iowa, Art. 1, sec. 3.

The practice of reading the Bible and repeating the Lord's Prayer in the opening exercises of public school does not foster or propagate sectarian doctrines and does not constitute a use of tax-supported property or the tax-supported school system for sectarian purposes and does not "destroy or weaken or affect the cleavage between church and state"; it "does not bridge or conjoin the two."

*Lewis vs. Bd. of Ed.*, 157 Misc. 520, 285 N. Y. Supp. 164, 174 (1935), modified in other respects in 247 App. Div. 106, 286 N. Y. Supp. 174 (1935), rehearing denied in 247 App. Div. 873, 288 N. Y. Supp. 751 (1936), appeal dismissed in 276 N. Y. 490, 12 N. E. (2d) 172 (N. Y. Ct. of Appeals, 1937).

#### POINT V.

The reading of at least five verses of the Old Testament, without comment, and the repeating of the Lord's Prayer in the opening exercises of public schools are not prohibited by the First and Fourteenth Amendments to the Constitution of the United States.

Our Founding Fathers certainly did not intend that there should be hostility between church and state, between religion and government, nor public recognition of religion be eliminated. The Declaration of Independence disposes of that contention when it asserts as a self-evident truth that "All men are endowed by their Creator with certain inalienable rights; and that to secure these rights, governments are instituted among men."

The Supreme Court of the United States (*Gulf, Colorado & Santa Fe Rwy. Co. vs. Ellis*, 165 U. S. 150, at 160 (1897)), has said:

"... the latter (the Constitution), is but the body and the letter of which the former (the Declaration of Independence), is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence." (Parentheses ours.)

Obviously, the intention of the founding fathers was to affirm that the aforementioned inalienable rights of the citizen come from the Creator and not from the State and that the function of the State is to secure those rights, not to grant them.

The Constitution therefore, and particularly the First Amendment, must be read and interpreted in the notion that this is a "believing" nation. On this point it is interesting and informative to review the events leading up to the adoption of the First Amendment at the first session of the first Congress after the adoption of the new Constitution of the United States. James Madison, on June 8, 1789, made the following two proposals:

1. In Article 1, Section 9 of the Constitution:

"The civil rights of none shall be abridged on account of religious belief or worship, nor shall any *national religion* be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." (Italics ours.)

Annals of Congress, Vol. I, p. 434.



By August 15, 1789, the form of Madison's proposal under consideration in the House of Representatives had been altered to:

"No *religion* shall be established by law, nor shall the equal rights of conscience be infringed. (Italics ours.)

Annals of Congress, Vol. I, p. 729.

As the debate in the House of Representatives continued, Samuel Livermore, of New Hampshire, proposed that the wording should be as follows:

"Congress shall make no laws *touching* religion, or infringing the rights of conscience." (Italics ours.)

Stokes, "Church and State in the United States," Vol. I, p. 543.

Justice Story in his commentaries on the Constitution of the United States said:

"It yet remains a problem to be solved in human affairs whether any free government can be permanent where the public worship of God and the support of religion constitute no part of the policy or duty of the state in any assignable shape."

Story, "Commentaries on the Constitution of the United States" (Fifth Edition), p. 631.

On August 20, 1789, Fisher Ames, of Massachusetts, proposed that the religious clause of the First Amendment should read:

"Congress shall make no law *establishing* religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." (Italics ours.)

Annals of Congress, Vol. I, p. 766.

On August 20, by a two-thirds vote of the House of Representatives, the two original proposals of Madison were accepted, but the Senate of the United States refused to accept the House draft of the proposed Amendment.

The following is the form of the proposed religious clause of the First Amendment as it came to the Senate:

"Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."

There was long debate in the Senate and varied compromises were attempted. The following was substituted for the House proposal, but also was defeated:

"Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."

Journal of the First Session of the Senate (Gales and Seaton, 1820).

Finally, on September 9, 1789, the Senate adopted the following text:

"Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion."

Journal of the First Session of the Senate, *supra*, p. 70.

On September 21, 1789, the House of Representatives refused to accept the Senate form of the religious clause of the First Amendment. After a conference the following language was adopted by both Houses on September 25, 1789, and was subsequently ratified as the religious clause

of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." (United States Constitution Amendments, Article I; *Reynolds vs. United States*, 98 U. S. 145, 2 L. Ed. 244 (U. S. Sup., 1878).)

The philosophy leading to the adoption of the First Amendment was not the complete separation of Church and State, but rather to enact the constitutional principle of "no established Church or Religion."

- *Davis vs. Beason*, 133 U. S. 333; 33 L. Ed. 637; 10 S. Ct. 299 (U. S. Sup., 1890).

The modern idea of "separation of Church and State," is an attempt to substitute those particular words for the very specific language of the First Amendment.

In substantiation of this position, and as a basic reason for the passage of the First Amendment, we find in *Davis vs. Beason*, *supra*, at page 342 the following remark:

"The oppressive measures adopted and the cruelties and punishments inflicted by the governments of Europe for many ages, to compel parties to conform in their religious beliefs and modes of worship, to the views of the most numerous sect and the folly of attempting in that way to control mental operations of persons and enforce an outward conformity to a prescribed standard led to the adoption of the (first) amendment in question." (Parenthesis ours.)

The right of a man to worship God or even refuse to worship God, is as fundamental in a free government like ours, as is the right to life, liberty or the pursuit of happiness. *Knowlton vs. Baumhover*, 183 Iowa 671, 166 N. W. 202, 2 A. L. R. 841 (S. C., Iowa, 1918); *Cline vs. State*, 9 Okla. Crim. Rep. 40, 130 P. 510, 45 L. R. A., N. S. 108 (Cr. Ct. App., Okla., 1913).

However, in order to violate the constitutional right to religious freedom, a statute must work an establishment of a religion, or prohibit the free exercise thereof. It must provide for compulsory support, by taxation, or otherwise, or religious instruction, make attendance upon religious worship compulsory, work a restriction upon the exercise of religion according to the dictates of conscience, or impose restrictions upon the expression of religious belief. *State ex rel. Temple vs. Barnes*, 22 N. D. 18, 132 N. W. 215, 37 L. R. A. N. S. 114, Ann. Cas. 1913, E. 930 (S. C., N. D., 1911).

Appellants in their brief rely for the most part on *McCullum vs. Board of Education*, 333 U. S. 203, 92 L. Ed. 649, 68 Sup. Ct. 461, 2 A. L. R. (2d) 1338 (U. S. Sup., 1948). An analysis of the various opinions in the case, however, reveals that the case actually supports the argument of the appellees and that the holding in that case is directed against sectarianism in the public schools—that what the Court actually meant was a wall of separation between sectarianism and government.

The facts were as follows:

In 1940, interested members of the Jewish, Roman Catholic and a few of the Protestant faiths, formed a voluntary association called the Champaign Council on Religious Education. They obtained permission from the Board of Education to offer classes in religious instruction to public school pupils in grades 4 to 9, inclusive. Classes were made up of pupils whose parents signed printed cards requesting that their children be permitted to attend; they were held weekly, 30 minutes for the lower grades and 45 minutes for the higher. The council employed the religious teachers at no expense to the school authorities, but the instructors were subject to the approval and supervision of the superintendent of schools. The classes were taught in three separate religious groups by Protestant teachers, Catholic Priests and Jewish Rabbis, although for several years past there were apparently no classes instructed in the Jewish religion. Classes were conducted in the regular classrooms



of the school building. *Students who did not choose to take the religious instruction were not released from public school duties; they were required to leave their classrooms and go to some other place in the school building to pursue their secular studies. On the other hand, students who were released from a secular study for the religious instructions were required to be present at the religious classes. Reports on their presence or absence were to be made to their secular teachers.*

Mr. Justice Frankfurter at page 212 said:

*"Illinois has here authorized the commingling of sectarian with secular instruction in the public schools. The Constitution of the United States forbids this."*

Obviously, the decision is directed only against sectarianism and sectarian religious instruction conducted by religious teachers who were subject to the approval and supervision of the public school authorities. That decision is no authority for a blanket prohibition, such as is sought here, of the reading of extracts from the Old Testament, particularly when any child whose parents so desire may be excused from attendance at such reading.

The same Justice said at page 213:

*"But agreement, in abstract that the First Amendment was designed to erect a wall of separation between Church and State does not preclude a clash of views as to what the wall separates. Involved is not only the constitutional principle but the implications of judicial review in its enforcement. Accommodation of legislative freedom and constitutional limitation upon that freedom cannot be achieved by a mere phrase."*

Then after continuing a historical analysis of the problem and the phrase, the Justice continued "Enough has

been said to indicate that we are dealing not with a full blown principle, nor one having the definiteness of a surveyor's metes and bounds." Speaking further as to the aspects of the factual case of "released time" upon which the action in the *McCollum* case was predicated, Justice Frankfurter continued by saying (page 225):

"Of course 'released time' as a generalized conception undefined by differentiating particularities is not an issue for constitutional adjudication. Local programs differ from each other in many and crucial respects. Some 'released time' classes are under separate denominational auspices, others are conducted jointly by several denominations often embracing all of the religious affiliations of a sectarianism; others emphasize democracy, unity and spiritual values not anchored in a particular creed. In so far as these are manifestations merely of the free exercise of religion, THEY ARE QUITE OUTSIDE THE SCOPE OF JUDICIAL CONCERN, except in so far as the Court may be called upon to protect the right of religious freedom. It is only when challenge is made to the share that the public schools have in the execution of a particular released time program that close judicial scrutiny is demanded of the exact relation between religious instruction and the public educational system in the SPECIFIC SITUATION BEFORE THE COURT."

It is thus apparent that the only thing the *McCollum* case decided, was the law as applicable to the state of facts then before the Court *and no others*. Justice Frankfurter continuing stated (p. 231):

"We do not consider as indeed we could not, school programs not before us, which though colloquially characterized as released time, present situations differing in aspects that may well be constitutionally crucial. \* \* \* We do not now attempt to weigh, on

the constitutional scale, every separate detail or various combination of factors which MAY ESTABLISH A VALID 'RELEASED TIME PROGRAM.' (Indicating that even "released time" is constitutional under proper circumstances.)

Mr. Justice Jackson in concurring stated at page 234:

"The plaintiff, as she has every right to be, is an avowed atheist. What she has asked of the courts is that they NOT ONLY END THE 'RELEASED TIME' PLAN BUT ALSO BAN EVERY FORM OF TEACHING WHICH SUGGESTS OR RECOGNIZES THERE IS A GOD. She would ban all teaching of the Scriptures. She especially mentions as an example of invasion of her rights 'having pupils learn and recite such statements as "The Lord is my Shepherd I shall not want." And she objects to teaching that the King James version of the Bible "is called the Christians Guide Book," the Holy Writ and the Word of God,' and many other similar matters. This Court is directing the Illinois courts generally to sustain plaintiff's complaint without exception of any of these grounds of complaint, without discriminating between them and without laying down any standards to define the limits of the effect of our decision."

Continuing Justice Jackson states:

"To me the sweep and detail of these complaints is a danger signal which warns of the kind of local controversy we will be required to arbitrate (Such as our case now at Bar) if we do not place appropriate limitation on our decision and exact strict compliance with judicial requirements. Authorities list 256 separate and substantial religious bodies to exist in continental United States. Each of them through the suit of some discontented but unpenalized and untaxed representative has as good a right as this plaintiff to demand that the courts compel the schools to sift out of their



teaching everything inconsistent with their doctrines. IF WE ARE TO ELIMINATE EVERYTHING THAT IS OBJECTIONABLE TO ANY OF THESE WARRING SECTS OR INCONSISTENT WITH ANY OF THEIR DOCTRINES, WE WILL LEAVE PUBLIC EDUCATION IN SHREDS. NOTHING BUT EDUCATION CONFUSION AND A DISCREDITING OF THE PUBLIC SCHOOL SYSTEM CAN RESULT FROM SUBJECTING IT TO CONSTANT LAW SUITS." (Parenthesis ours.)

Continuing Justice Jackson said:

"While we may and should end such formal and explicit instruction as the Champaign Plan and can at all times prohibit teaching of creed and catechism and ceremonial and can forbid forthright proselyting in the schools, I think it remains to be demonstrated whether it is possible, even if desirable, to comply with such demands as plaintiff's, completely to isolate and cast out of secular education ALL THAT SOME PEOPLE MAY REASONABLY REGARD AS RELIGIOUS INSTRUCTION. \* \* \* But it would not seem practical to teach either practice or appreciation of arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral or painting without the scriptural themes would be eccentric and incomplete even from a secular point of view. \* \* \* The fact is, that for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life is saturated with religious influences derived from paganism, Judaism, Christianity, both Catholic and Protestant and other faiths accepted by a large part of the world's people. \* \* \*

Following that decision, and apparently in reliance upon it, there was presented for consideration to the Supreme Court, Albany County, New York, a second proceeding by Joseph Lewis which was the subject of a decision by Mr. Justice Elsworth of that Court in November, 1948. In that decision the Court outlined at length the distinctions



existing between the Champaign plan considered by the Supreme Court of the United States and the released time program in New York, before that Court for consideration. In a well reasoned opinion, Mr. Justice Elsworth said (193 Misc. 66, 73):

"In view of the opinion herein expressed that the decision in the *McCollum* case does not make 'Released Time' as such unconstitutional, the programs challenged in this proceeding can only be condemned upon a finding that they are in aid of religion. That is the ground upon which the decision in the *McCollum* case is predicated. This court cannot so find. It believes the New York plan free from the objectionable features which motivated the United States Supreme Court to declare the Champaign plan unconstitutional."

Appeal from this decision was dismissed by the New York Court of Appeals (276 N. Y. 90).

The other case relied on so strongly by appellants is that of *People ex rel. Ring vs. Board of Education*, 245 Ill. 344, 92 N. E. 251, 29 L. R. A. N. S. 442 (Ill. Sup. Ct., 1910)?

In the *Ring* case, there were definite, overt, participatory acts required of the students. These acts consisted of requiring students to rise in their seats, fold their hands, bow their heads, and then to sing aloud selected hymns, to repeat audibly the Lord's Prayer and from time to time to explain the meaning of certain passages of the Scriptures read. We do not dispute the unconstitutionality of these requirements and agree with the Illinois Supreme Court, which, speaking through *DUNN, J.*, said at page 252 of Vol. 92, *Northeastern Reporter*:

"The exercises mentioned in the petition constitute worship. . . . Their compulsory performance would be a violation of the constitutional guaranty of the free exercise and enjoyment of religious profession and worship. One does not enjoy the free exercise of reli-

gious worship who is *compelled* to join in any form of religious worship."

However, there are no such requirements in our New Jersey statutes (R. S. 18:14-77 and 78.)  
(All italics ours.)

## POINT VI.

The prohibition against "*aid to religion*" is not directed against such things as reading from the Old Testament without comment and recital of the Lord's Prayer in the Public Schools.

Today there is a real necessity for clearly defining the boundaries of the principle of separation of Church and State and limiting the application of the principle in such a way that it will be harmonious with the basic traditions of our public school system and our country.

We in the United States have always had separation of Church and State along with Bible reading in our public schools. Appellants argue that the principle of separation of Church and State; that is, absolute separation, made this country great and is the foundation of the public school system. However, if this be true, we question appellants' ability to harmonize their argument with the fact that our founding fathers always associated Bible reading with religious liberty. Co-operation of Church and State is one of the principal factors underlying the liberty which the people enjoy today. Obviously, if Bible reading in the public schools violates the concept of separation of Church and State then our public school system would not have developed so effectively.

The argument of appellants is a new one. It attempts to jettison the traditional interpretation of the principle of separation of Church and State and establish in its place the continental concept which has resulted in the secularization and socialization of the private institutional system—in many countries the complete annihilation of the pri-

vate institutional system. The public school system reflects free enterprise and local option. The opposition would attempt to eliminate these factors and strait-jacket it by the concept of separation.

This Court held in the *McCullum* and *Everson* cases, *supra*, that a State may not pass laws which "aid" religion. The appellants now attempt to pervert the decisions of the Court by arguing in effect that by the word "aid" the Court meant that there should be no recognition of religion by government, no co-operation for the common good between government and religion and, if their argument is followed to its logical end, that there should be actual hostility between government and religion. We submit that the Constitution must not be interpreted in this vein and that nonsectarian recognition of God and religion and co-operation between religion and the State or government were not interdicted where they foster the growth of the community and at the same time preserve the rights of the individuals within the community. This is the real vital principle which has given a distinctive character to democracy as we in the United States of America know it. We submit that any attempt to interpret the word "aid" so broadly as to exclude all co-operation between Church and State encounters a conflict between two portions of the *Everson* decision, *supra*: the one which sets forth the Court's concept of Church and State; the other which says that the State may not be the adversary of religion. The middle ground and the constitutional ground is co-operation consistent with religious liberty.

That this is the correct approach is clearly demonstrated by the numerous instances in our laws and other public utterances wherein the Deity or religion are mentioned. To name only a few we respectfully call the Court's attention to oaths which must be taken by those appointed to this Court and by Federal officeholders, both of which conclude with the phrase: "So help me God"; to the United States coined dollar containing the words: "In God We Trust"; to the daily invocation of Divine blessings by

chaplains of Congress; to commissioned chaplains in the armed forces; to our National Anthem, and to the President's most recent Thanksgiving Day Proclamation issued on November 1, 1951, which read as follows:

"More than three centuries ago the Pilgrim Fathers deemed it fitting to pause in their Autumn labors and to give thanks to *Almighty God* for the abundant yield of the soil of their homeland. In keeping with that custom, hallowed by generations of observance, our hearts impel us, once again in this Autumnal season, to turn in humble gratitude to *the giver of our bounties*.

"We are profoundly grateful for the *blessings bestowed upon us*: The preservation of our freedom, so dearly bought and so highly prized; our opportunities for human welfare and happiness, so limitless in their scope; our material prosperity, so far surpassing that of earlier years; and our private spiritual blessings, so deeply cherished by all. For these *we offer fervent thanks to God*.

"With the co-operation of our Allies we are striving to attain a permanent peace, and to assure success in achieving the coveted goal, we reverently place *our faith in Almighty*.

"Now, Therefore, I, Harry S. Truman, President of the United States of America, according to our treasured tradition, and in conformity with the joint resolution of Congress approved on December 26, 1941, designating the fourth Thursday of November in each year as Thanksgiving Day, do hereby proclaim Thursday, November 22, 1951, as a day of national thanksgiving. *Let us all* on that day, in our homes and in our places of Worship, individually and in groups, *render homage to Almighty God*. Let us recall the words of the Psalmist, 'O *give thanks unto the Lord; for He is good; For His mercy endureth forever.*' Let us also, on the appointed day, *seek divine aid in the quest for Peace.*" (Italics ours.)



## CONCLUSION.

It is respectfully submitted that the judgment of the New Jersey Supreme Court should be affirmed and the appeal dismissed upon the following grounds: (1) appellants have not shown sufficient injury to raise a substantial Federal question in their suits as citizens and taxpayers; (2) they are estopped; (3) Bible reading and recital of the Lord's prayer in the public schools of New Jersey and elsewhere amount to nonsectarian recognition of God in the schools which is not forbidden by the First Amendment; (4) since all or any of the students may be excused from the exercises there is no compulsive feature; (5) the statutes under attack were enacted by the State of New Jersey pursuant to a valid exercise of the police power reserved to the states; the practices provided for in the statute do not violate the First and Fourteenth Amendments of the Federal Constitution; (7) the practices provided for in the Statutes do not "aid" religion in the manner prohibited in the *Everson* and *McCullom* cases.

Respectfully submitted,

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 Counsel for Appellee, the State of  
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HENRY F. SCHENK,  
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 Of Counsel.*



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# Supreme Court of the United States

No. 9. October Term, 1951.

DONALD R. DOREMUS and ANNA E. KLEIN,  
*Appellants,*

*vs.*

BOARD OF EDUCATION OF THE BOROUGH  
OF HAWTHORNE and THE STATE OF NEW  
JERSEY,

*Appellees.*

APPEAL FROM THE SUPREME COURT OF THE  
STATE OF NEW JERSEY.

**SUPPLEMENT TO APPELLEES' STATEMENT  
OPPOSING JURISDICTION AND MOTION  
TO DISMISS OR AFFIRM.**

THEODORE D. PARSONS,  
*Attorney General of New Jersey.*

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Jersey.*

ALEXANDER E. FASOLI,  
*Counsel for Appellees.*





# **Supreme Court of the United States**

No. 9. October Term, 1951.

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**DONALD R. DOREMUS and ANNA E. KLEIN,**  
*Appellants,*

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**BOARD OF EDUCATION OF THE BOROUGH  
OF HAWTHORNE and THE STATE OF NEW  
JERSEY,**

*Appellees.*

---

**APPEAL FROM THE SUPREME COURT OF THE  
STATE OF NEW JERSEY.**

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## **SUPPLEMENT TO APPELLEES' STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.**

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### **PRELIMINARY STATEMENT.**

At the hearing of the cause, before this Honorable Court on January 31, 1952, upon motion duly made, leave was granted to file a statement, supplemental to appellees' statement opposing jurisdiction.

### **MATTERS AND GROUNDS MAKING AGAINST JURISDICTION.**

#### **I.**

Appellees, Board of Education of the Borough of Hawthorne and The State of New Jersey, incorporate herein by reference and make a part hereof the entire argument set forth in Appellees' statement opposing jurisdiction and motion to dismiss or affirm, filed in the cause and which is designated as No. 556, October Term, 1950.

## II.

Appellants have not shown sufficient injury or damage to raise a substantial justiciable controversy either under State or Federal law.

All factual matters in the cause having been admitted, appellants failed to show that they have given rise to an actual controversy, one which is justiciable in nature.

It is equally clear that to obtain a declaratory judgment both in the courts of the State of New Jersey and in the Federal courts, there must be a justiciable difference, subject to action in a court of justice as distinguished from a mere disagreement or debate.

The law is well settled in the State of New Jersey that the power granted courts to declare rights, statutes and other legal relations, and particularly to determine any question of construction or validity arising under a statute, is circumscribed by the salutary qualification that the jurisdiction of the courts may not be invoked in absence of an actual controversy. The first point to be considered in any proceeding for a declaratory judgment is whether or not the controversy that is presented in the briefs and at the oral argument is actual and bona fide or is merely one in which the semblance of judicial proceedings and the form of due process are present. *New Jersey Turnpike Authority vs. Parsons*, 3 N. J. 235 (N. J. S. C., 1949).

Examination of the record in the case at bar clearly discloses the absence of a justiciable controversy. The New Jersey Supreme Court said in its opinion through Case, J., "No one is before us asserting that his religious practices have been interfered with or that his right to worship in accordance with the dictates of his conscience has been suppressed. No religious sect is a party to the cause. No representative of, or spokesman for, a religious body has attacked the statute here or below. One of the plaintiffs is 'a citizen and taxpayer'; the only interest he asserts is just

that and in those words, set forth in the complaint and not followed by specification or proof. It is conceded that he is a citizen and a taxpayer, but it is not charged and it is neither conceded nor proved that the brief interruption in the day's schooling caused by compliance with the statute adds cost to the school expenses or varies by more than an incomputable scintilla the economy of the day's work. The other plaintiff, in addition to being a citizen and a taxpayer, has a daughter, aged seventeen, who is a student of the school. Those facts are asserted, but, as in the case of the co-plaintiff, no violated rights are urged. It is not charged that the practice required by the statute conflicts with the convictions of either mother or daughter. Apparently the sole purpose and the only function of plaintiffs is that they shall assume the role of actors so that there may be a suit which will invoke a court ruling upon the constitutionality (fol. 38) of the statute. Respondents urge that under the circumstances the question is moot as to the plaintiffs-appellants and that our declaratory judgment statute may not properly be used in justification of such a proceeding. Cf. *New Jersey Turnpike Authority vs. Parsons*, 3 N. J. 235; *Massachusetts vs. Mellon*, 262 U. S. 447, at 488, 67 Law Ed. 1078, at 1085, 43 Sup. Ct. 597 (1923). The point has substance but we have nevertheless concluded to dispose of the appeal on its merits." Record 24 and 25.

As recently as 1950 this Honorable Court, speaking through Burton, J., said, "The touchstone to justiciability is injury to a legally protected right . . . ." *Joint Antifacist Refugee Committee vs. McGrath*, 341 U. S. 123, at 140; 95 Law Ed. 817. Pointed out in Appellees' statement making against jurisdiction, "No injury to a legally protected right has been shown by either of the Appellants."

Appellees strongly feel that it is evident from the transcript of the record that Appellants have failed to show justiciable issue, damage, injury, or a religious belief or disbelief which was adversely affected by the State statute under examination. It is, therefore, urged by Appellees

that the cause before this Honorable Court be dismissed for the reasons set forth herein and in Appellees' statement making against jurisdiction heretofore filed.

Respectfully submitted, .

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*Attorney General of New Jersey.*

HENRY F. SCHENK,  
*Deputy Attorney General of New Jersey.*

ALEXANDER E. TASOLI,  
*Counsel for Appellees.*

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# Supreme Court of the United States

OCTOBER TERM, 1951

No. 9

DONALD R. DOREMUS AND ANNA E. KLEIN,

*Appellants,*

*vs.*

BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE  
AND THE STATE OF NEW JERSEY

APPEAL FROM THE SUPREME COURT  
OF THE STATE OF NEW JERSEY

BRIEF OF THE AMERICAN JEWISH CONGRESS,  
AMICUS CURIAE

LEO PFEFFER,  
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# Supreme Court of the United States

OCTOBER TERM, 1951

No. 9

DONALD R. DOREMUS AND ANNA E. KLEIN,

Appellants,

VS.

BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE  
AND THE STATE OF NEW JERSEY

APPEAL FROM THE SUPREME COURT  
OF THE STATE OF NEW JERSEY

## BRIEF OF THE AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

The American Jewish Congress respectfully submits this brief, *amicus curiae*, with the consent of the parties.

### Interest of the American Jewish Congress

The American Jewish Congress was organized " \* \* \* to help secure and maintain equality of opportunity \* \* \* safeguard the civil, political, economic and religious rights of Jews everywhere \* \* \* [and] \* \* \* to help preserve, maintain, and extend the democratic way of life." Consistent with these purposes we joined in the submission of a brief *amicus curiae* to this court in *People ex rel Mc-*

*Collum v. Board of Education*<sup>1</sup> in which we argued the constitutional invalidity of religious teaching in the public schools. We there urged that political liberty and religious freedom could remain inviolate only when there was no intrusion of secular authority in religious affairs or of religious authority in secular affairs. The continued separation of church and state, we stressed, was an indispensable requisite of religious liberty as envisioned by the framers of the First Amendment.

Thereafter we again submitted a brief amicus curiae in a case involving the constitutional guaranty of religious liberty and separation of church and state. In our brief in *Stainback v. Po*<sup>2</sup> we argued that a Hawaiian statute restricting foreign language schools constituted an interference with religious teaching inhibited by the First Amendment. We are submitting this brief because once again the guaranty of religious liberty and separation of church and state is challenged by State action.

We regard the principle of religious liberty and separation of church and state as fundamental to American democracy. We deem any breach in the wall separating church and state as jeopardizing the political and religious freedoms which that wall was intended to protect. We believe, further, that our free nonsectarian public school system is one of the most precious products of our American democracy and a unique contribution to modern civilization. We, therefore, feel impelled to express our opposition whenever attempts are made to compromise its integrity.

The evils which James Madison foresaw from impairment of the principle of separation in his Memorial and

<sup>1</sup> Brief of the Synagogue Council of America and National Community Relations Advisory Council in *People of the State of Illinois ex rel. Vashti McCollum v. Board of Education*; Champaign, Ill., 333 U. S. 203, October, 1947, Term, No. 90.

<sup>2</sup> October 1948 Term, No. 52.



Remonstrance Against Religious Assessment<sup>3</sup> have been proved inevitable when the impairment occurs within the public educational system. The "animosities and jealousies" which accompanied the introduction of the Virginia Assessment Bill<sup>4</sup> are ever present when religious groups seek to employ the public school system to further their sectarian ends. The divisiveness which inevitably results when sectarianism enters the public school affects all American children, but is particularly harmful to children of minority faiths.

For these and other reasons we have consistently opposed the encroachment of religious instruction or worship on the field of public education. We sympathize with and greatly respect the depth of conviction and sincerity motivating those who seek to invoke the aid of the public school system in meeting the problem of religious illiteracy. We doubt greatly that the problem can effectively be met by the device of Bible reading in the public school. But even if it could, the crucial issues involved and our consistent adherence to the principle of separation and liberty would compel us to submit this brief.

Were it not that some, either through misunderstanding or ill-will, equate opposition to religion within the public school system with opposition to religion, we would hardly need state that our position is in no way motivated by hostility to religious instruction.<sup>5</sup> As an organization dedi-

<sup>3</sup> Annexed as Appendix to *Everson v. Board of Education of the Township of Ewing*, 330 U. S. 1, at p. 63 (1947).

<sup>4</sup> *Ibid.*

<sup>5</sup> This Court, itself, pointed out in the *McCullum* case that:

"To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion. For the First Amendment rests

ated to Jewish survival, we naturally place Jewish religious education in the forefront of our activities. In Jewish history and tradition, religious instruction has always been regarded a sacred responsibility of the Jewish community. Today, the overwhelming majority of Jewish children voluntarily attend after-hour and Sunday schools conducted by local Jewish communities where they receive their religious education wholly independent of the public school system.<sup>6</sup> We believe, however, that the responsibility for religious education may not and should not be shared with the public school system, and that the support of government in this field is neither desirable nor necessary. We believe with Jefferson that "It is error alone which needs the support of government. Truth can stand by itself."<sup>7</sup>

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upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. \* \* \* " (333 U. S. 203, 214-212.)

Mr. Justice Frankfurter, in his concurring opinion was similarly careful to point out that:

"The secular public school did not imply indifference to the basic role of religion in the life of the people, nor rejection of religious education as a means of fostering it. The claims of religion were not minimized by refusing to make the public schools agencies for their assertion. \* \* \* " (*Ibid.*, at p. 216.)

These disclaimers, unfortunately, did not forestall abuse of this Court and its decision from sectarian circles. See, e.g., Statement of Catholic Bishops, New York Times, Nov. 21, 1948, p. 63; O'Neill, Religion and Education under the Constitution (1949), *passim*.

<sup>6</sup> Three out of every four Jewish children receive religious instruction at some time or another. Jewish Education Association of New York, *Twenty-five Years of Jewish Education in the U. S.*, American Jewish Year Book (1936-1937) 104; Hurwich, *Religious Education and the Release Time Plan*, Jewish Education (1941) 103-107.

<sup>7</sup> *Notes on Virginia*, in Blau, Cornerstones of Religious Freedom 79 (1949).

## Statement of the Case

The appellants, Donald R. Doremus and Anna E. Klein, brought suit in the Superior Court of New Jersey, Passaic County, to enjoin observance of two statutes providing for Bible reading in the public schools of New Jersey (R. 1-3). Appellant Doremus sued as a taxpayer and Appellant Klein as the mother of a child attending the public school conducted by Appellee Board of Education (R. 1). Although no exemption or exception is contained in either statute, it was stipulated that a directive issued by Appellee Board of Education provides that "any student may be excused during reading of the Bible upon request", and that in the present case neither Appellant Klein nor her child requested to be excused. Unsuccessful in the Superior Court (R. 6-7) and in the Supreme Court of New Jersey (R. 22-38), appellants obtained an order by Mr. Justice Burton allowing appeal to the Supreme Court of the United States (R. 38-39). Thereafter, on March 12, 1951, this Court made an order postponing to the hearing on the merits further consideration of the question of jurisdiction and of appellees' motion to dismiss or affirm (R. 43).

## Statutory and Constitutional Provisions Involved

The purpose of appellants' suit is to test the constitutionality of two sections of the Revised Statutes of New Jersey (1937). R. S. 18:14-17 provides:

"At least five verses taken from that portion of the Holy Bible known as the Old Testament shall be read, or caused to be read, without comment, in each public school classroom, in the presence of the pupils therein assembled, by the teacher in charge, at the opening of school upon every school day, unless there is a general assemblage of the classes at the opening of the school on any school day, in which event the reading shall be

done, or caused to be done, by the principal or teacher in charge of the assemblage and in the presence of the classes so assembled."

R. S. 18:14-78 provides:

"No religious service or exercise, except the reading of the Bible and the repeating of the Lord's prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools."

The statutes are attacked as violative of the First and Fourteenth Amendments to the United States Constitution, which provide in part:

I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; \* \* \*"

XIV. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws \* \* \*"

This brief is predicated upon the assumption that the statute here involved provides for reading from the Bible as a devotional or religious act. This is implicit in the provision barring comment in the first section and is practically explicit in the second section's bar of "*religious service or exercise except the reading of the Bible or the repeating of the Lord's Prayer.*" The assumption was accepted by all the parties hereto and by both State courts.\*

\* See, e.g., R. 37: "We consider that the Old Testament and the Lord's Prayer \* \* \* [are] a simple recognition of the Supreme Ruler of the Universe and a deference to His majesty \* \* \*"



It is, however, an assumption which must be clearly recognized; for we believe no substantial constitutional issue is raised by a statute providing for the reading or even study of the Bible as a work of literature or for its cultural or historic significance.<sup>9</sup> It is only when the reading of the Bible is an act of religion, or, in the definition of the Virginia Declaration of Rights, an act in the "discharging" of "the duty which we owe to our Creator"<sup>10</sup> that constitutional issues are raised.

### Question Presented

The question presented by this case, and to which this brief is addressed, is the validity under the First and Fourteenth Amendments to the Federal Constitution of a statute which requires daily reading in the public schools from the Old Testament and permits reading from the New Testament and recitation of the Lord's Prayer, in all cases as devotional acts. Specifically, does this statute constitute a law "respecting an establishment of religion or prohibiting the free exercise thereof".

### Summary of Argument

A statute providing for the reading of the Bible or the recitation of the Lord's Prayer as devotional acts in the public school violates the guaranty of the First Amendment against laws respecting an establishment of religion or prohibiting the free exercise thereof, which is made applicable to the States by the Fourteenth Amendment. Such a statute is a law which aids one religion and prefers one religion over another; at the very least, it aids all re-

<sup>9</sup> See concurring opinion of Mr. Justice Jackson in *People ex rel. McCollum v. Board of Education*, 333 U. S. 203 at 235-236.

<sup>10</sup> Quoted in Madison's Memorial and Remonstrance Against Religious Assessments, appended to *Everson v. Board of Education*, 330 U. S. 1 at 64.

ligions. It forces profession of belief or disbelief in a religion. It utilizes the public school to aid religious faiths or sects in dissemination of their doctrines and it helps to provide pupils for the inculcation of religion through use of the State's compulsory public school machinery.

The claimed voluntariness of participation is both fictional and irrelevant. The claimed non-sectarianism of the Bible is likewise fictional and irrelevant. Measured by the interpretation of the First Amendment expressed in the *Everson* and *McCullum* decisions, a public school program of devotional Bible reading or Lord's Prayer recitation is clearly invalid. The New Jersey statutes here attacked can stand only if this Court retreats from the position it has taken in the *Everson* and *McCullum* cases and accepts an interpretation of the First Amendment which it has only recently twice rejected. No adequate reason has been offered for the Court's present acceptance of that interpretation.

## ARGUMENT

**A statute providing for Bible reading or recitation of the Lord's Prayer as devotional acts in the public school violates the guaranty of the First Amendment against laws establishing religion or prohibiting its free exercise.**

### A. The unitary guaranty of the First Amendment

We submit that the statute attacked in this action is violative not only of the "establishment" aspect of the First Amendment but of the "free exercise" as well. Indeed, we submit that any law respecting an establishment of religion necessarily prohibits its free exercise. Sectarian groups which condemn as "error" the concept of separation developed by American democracy<sup>11</sup> or, at best, "the shib-

<sup>11</sup> Syllabus of Errors of Pope Pius IX. Paragraph 55 in Dogmatic Canons and Decrees.

boleth of doctrinaire secularism,"<sup>12</sup> naturally view the establishment bar as of secondary importance, meriting only the narrowest construction and expendible where obvious governmental compulsion easily recognized as a restriction on religious freedom is not proved.<sup>13</sup>

It is this approach which was adopted by the Supreme Court of New Jersey.<sup>14</sup> We urge, however, that this approach is erroneous. In the evolution of the American democratic tradition with respect to religion which culminated in the First and Fourteenth Amendments, there was no dichotomy between separation and freedom. Those whose words and deeds inspired the Constitutional fathers were convinced that religious freedom could be secured only if separation were guaranteed, and that freedom necessarily encompassed separation. To them, the concepts were not merely synonymous, they were identical.<sup>15</sup> As

<sup>12</sup> Statement of Catholic Bishops, *supra*.

<sup>13</sup> See e.g., Father Murray, "Law or Prepossessions?" 14 Law Contemp. Problems, 23 (1949): " \* \* \* separation of church and state \* \* \* put in its proper grounds in its true relation to the free exercise of religion \* \* \* [is] instrumental to freedom, therefore \* \* \* a relative not an absolute in its own right." Father Parsons, *The First Freedom*, p. 79 (1948): "As for those who profess no religion, or who repudiate religion, it is difficult to conceive how they can appeal to the First Amendment, since this document was solely concerned with religion itself not its denial. By its very nature as regards what it says about religion, they are outside its ken." See also statement in *Gordon v. Board of Education*, 78 Cal. App. 2d 464 (1947) and *Zorach v. Clauson*, 22 N. Y. Supp. 2d 339, 344 (1950), that the First Amendment guarantees "freedom of religion, not freedom from religion."

<sup>14</sup> "No one is asserting that his religious practices have been interfered with or that his request to worship in accordance with the dictates of his conscience has been suppressed. No religious sect is a party to the cause. No representative of, or spokesman for, a religious body has attacked the statute here or below \* \* \*". (R. 24).

<sup>15</sup> Roger Williams opposed an "enforced uniformity of religion" [freedom concept] "because it confounds the Civil and Religious" [separation concept]. *The Bloody Tenet of Persecution*, paragraph "Tenthly", quoted in Blau, *Cornerstones of Religious Freedom* in

Justice Jeremiah S. Black stated in his address on Religious Liberty:

"The manifest object of the men who framed the institutions of this country, was to have a State without religion and a Church without politics—that is to say, they meant that one should never be used as an engine for any purpose of the other \* \* \*. For that reason they built up a wall of complete and perfect partition between the two."<sup>16</sup>

The validity of the American democratic tradition of the unity of freedom and separation is manifest in the position of religious freedom in contemporaneous totalitarian states. Wherever the church or the state seeks to use the other as an engine for its own purpose, that is, wherever a state or a church pierces the wall of partition between them, freedom inevitably suffers. Mussolini, a confirmed atheist most of his life and the father of modern totalitarianism, found no difficulty in according state support for religion,<sup>17</sup> for he effectively used the church as an engine for his purposes.<sup>18</sup> The Soviet Government, equally totalitarian and equally atheistic, finds no difficulty in conferring upon its church state support, for it also effectively uses the church as an engine for state purposes.<sup>19</sup> Conversely in Spain, another totalitarian state, the church uses the state as an engine to further its own purposes.<sup>20</sup> In all of

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*America* (1929), p. 37. Madison fought a bill establishing a provision for teachers of the Christian religion [separation concept] because it violated the "fundamental and undeniable truth, that religion \* \* \* can be directed only by reason and conviction, not by force or violence" [freedom concept]. Memorial and Remonstrance.

<sup>16</sup> *Essays and Speeches* (1886) 51.

<sup>17</sup> See *Treaty and Concordat Between the Holy See and Italy*, National Catholic Welfare Conference.

<sup>18</sup> Binchy, *Church and State in Fascist Italy* (1941).

<sup>19</sup> Timasheff, *Religion in Soviet Russia*, 1917-1942.

<sup>20</sup> Bates, *Religious Liberty* (1945) 14-20.



these countries religious freedom has been the inevitable victim.<sup>21</sup>

The unity of the separation and freedom aspects of the First Amendment was recognized in the definitive interpretation of the "establishment" clause announced in the *Everson* case and reiterated in the *McCullum* case:<sup>22</sup>

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state'."

We urge that the statute under attack in the present case violates both aspects of the "religion" clause of the First Amendment. It is not merely a law which aids one religion and prefers one religion over another, but also a law which forces persons to profess a belief or disbelief in religion and which punishes them for entertaining or professing re-

<sup>21</sup> Bates, *supra*, 2-9, 14-23, 40-49.

<sup>22</sup> *Everson*, 330 U. S. 1, at 15-16; *McCullum*, 333 U. S. 203 at 210-11. It is significant that Jefferson's "separation" phrase was accepted by this Court as an authoritative interpretation of the First Amendment in a case in which a statute proscribing bigamy was attacked as an infringement of religious freedom. *Reynolds v. U. S.*, 98 U. S. 145, 164 (1878).

ligious beliefs or disbeliefs. We urge that this case illustrates once again that under our tradition, religious freedom can best be guaranteed if the wall of separation between church and state is maintained secure and impregnable.

### **B. Forcing profession of religious belief or disbelief**

It is important to note that the New Jersey statute makes no provision for consent by public school children or their parents for participation in Bible reading or Lord's Prayer recitation.<sup>23</sup> Indeed, the statute makes no provision for the excusing of children whose religious convictions preclude their participation.<sup>24</sup> On its face, the New Jersey statute, we submit, compels participation in religious exercises and is therefore violative of the First Amendment.

It is true that a "directive" was issued by Appellee Board of Education that "any student may be excused during reading of the Bible upon request" (R. 5). Assuming that the Board had authority to issue such a "directive" notwithstanding the clear and unambiguous language of the statute, there is nothing in the record to indicate that the "directive," whenever it was issued, was communicated to the school children or their parents. Absent such communication, participation was patently compulsory. Neither appellant Klein nor her daughter requested that the latter be excused from participation in Bible reading, even though their opposition to the practice was sufficiently intense

<sup>23</sup> In this respect, this statute is significantly different from released time programs where prior consent of parents is required for children's participation. *McCullum* case, 333 U. S. 203 at 207; Davis, *Weekday Classes in Religious Education*, U. S. Office of Education Bulletin No. 3, 1941, p. 3.

<sup>24</sup> Cf., e.g., Code of Iowa, 1931 Section 4528: "The Bible shall not be excluded from any public school or institution in the state, nor shall any child be required to read it contrary to the wishes of his parent or guardian."

to cause them to brave the displeasure of their community by bringing this suit.<sup>25</sup>

Even if the "directives" were communicated to the children or their parents, the element of compulsion would not thereby be eliminated. This was recognized by the Justices joining in the concurring opinion of Mr. Justice Frankfurter in the *McCollum* case:

" \* \* \* That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend \* \* \* " <sup>26</sup>

This observation is even more pertinent in the present case, where affirmative action by the child is required if he wishes to disassociate himself from the group, than in the *McCollum* case, where affirmative action was required for association.

Other courts have recognized that the nominal privilege of non-participation in Bible reading does not eliminate the element of "force or influence" or remove the punishment "for entertaining or professing religious beliefs or disbeliefs." Thus, the Supreme Court of Illinois has stated:

"The Kentucky and Kansas decisions seem to consider the fact that the children of the complainants were not compelled to join in the exercises as affecting the question in some way. That suggestion seems to us to concede the position of the plaintiffs in error. The exclusion of a pupil from this part of the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself,

<sup>25</sup> In the *McCollum* case the petitioner's child did not participate in the religious instruction. Transcript of Record in *McCollum* case, pp. 68, 175, 193.

<sup>26</sup> 333 U. S. 203 at 227.

deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school, which the law never contemplated. All this is because of his religious belief." <sup>27</sup>

The Supreme Court of Wisconsin made a similar observation:

"When . . . a small minority of the pupils in the public school is excluded; for any cause, from a stated school exercise, particularly when such cause is apparent hostility to the Bible which a majority of the other pupils have been taught to revere, from that moment the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion and subjected to reproach and insult. But it is a sufficient refutation of the argument that the practice in question tends to destroy the equality of the pupils which the constitution seeks to establish and protect, and puts a portion of them to serious disadvantage in many ways with respect to the others." <sup>28</sup>

An Iowa court came to the same necessary conclusion:

"Conceding, for argument's sake, that such attendance was voluntary, in the sense that no requirement or command was laid upon non-Catholic pupils to attend or take part in such exercises, yet, surrounded as they were by a multitude of circumstances all leading in that direction, impelled by the gregarious instincts of childhood to go with the crowd, and impressed with a sense of respect for their teachers, whose religious principles and church affiliation were unceasingly pressed upon their notice by their religious dress and strictly ordered lives, could a reasonable person expect the little handful of children from non-Catholic families to do otherwise than to enter the

<sup>27</sup> *People ex rel. Ring v. Board of Education*, 245 Ill. 334, 351 (1910).

<sup>28</sup> *State ex rel. Weiss v. District Board*, 76 Wis. 177, 199-200 (1890).



invitingly opened door of the church, and receive, with their companions, the instructions there given?"<sup>29</sup>

There was a time when compulsion to participate in Bible reading or prayer recitation was patent and direct. On one occasion, before the Civil War, a hundred Catholic children were expelled from a Boston public school for refusal to participate, and one child was severely flogged for the same reason.<sup>30</sup> In Indiana, in the 1880's, a Catholic girl who refused to learn a chapter from the Bible as required but recited "Maud Muller" instead was kept after school day after day in what turned out to be a vain attempt to force her to violate her religious scruples.<sup>31</sup> Today, compulsion and pressure are more subtle and circumstantial but are no less present.

Children of minority religious groups are particularly faced with a dilemma whenever religion intrudes upon the public school—a dilemma which is always hard and frequently is cruel. They must either subject themselves to being singled out as non-conformists or they must participate in religious practices and teachings at variance with what they learn at home or in their religious schools. It is understandable that not infrequently some of them choose the second alternative as the lesser evil, and that Catholic and Jewish children will participate in Protestant

<sup>29</sup> *Knowlton v. Baumhover*, 182 Iowa 691, 699-700 (1918). See also: *Kaplan v. Independent School District of Virginia*, 171 Minn. 142, 155-156 (1927) (dissent):

"To excuse some children is a distinct preference in favor of those who remain and is a discrimination against those who retire. The exclusion puts a child in a class by himself. It makes him religiously conspicuous. It subjects him to religious stigma. It may provoke odious epithets. His situation calls for courage."

<sup>30</sup> Whipple, *The Story of Civil Liberty in the United States*, p. 64 (1927).

<sup>31</sup> Beale, *A History of Freedom of Teaching in American Schools* (1941), p. 211.

religious practices in violation of their religious convictions and upbringing rather than subject themselves to the pain of not belonging.<sup>32</sup>

We submit that under the guaranty of separation and religious freedom, American children may not be placed in this dilemma by public school authorities. They may not be compelled to choose between being forced or influenced to profess a religious belief or disbelief or being punished for professing such belief or disbelief. It was to avoid in this country the oppression and bitterness which Old World experience had shown to be an inevitable concomitant of governmental intrusion in religion, that the fathers of our country gave constitutional protection to the principle that "religion is wholly exempt from [governments'] cognizance."<sup>33</sup> Religious compulsion and oppression, we submit, should not be allowed in the public schools even in a mild or subtle form.

Affirmance of the decision below would result in just such compulsion. The challenged statute requires school children to engage in an act of worship which conflicts with the conscience of some of them. The very bringing of this suit is proof of that fact. This court may not place the seal of approval on such oppression.

### C. Aiding and preferring one religion

A statute providing for Bible reading and Lord's Prayer recitations in the public schools aids and prefers the Christian religion to the extent that the reading is from the New Testament and the recitation is of the Lord's Prayer, and aids and prefers the Protestant religion if the reading is

<sup>32</sup> Synagogue Council of America, *Conference on Religious Education and the Public School* (1944), p. 26; 2 Stokes, *Church and State in the United States* (1950), p. 548. In the *McCollum* case, the trial court found that Catholic and Jewish children, as well as Protestants, attended the classes in Protestant religious instruction in the public school. Transcript of Record in *McCollum* case, p. 65.

<sup>33</sup> Madison's Memorial and Remonstrance, first paragraph.

(as usually is the case) from the King James' version of the Bible, or the Catholic religion if the reading is from the Douay or Knox version.

The New Jersey courts have sought to meet the attack that the statute herein is preferential by adopting the argument employed by most of the state courts which have upheld such statutes, that the Bible and the Lord's Prayer are "non-sectarian" (R. 17-19, 41, 33, 35, 37-38). We shall indicate later that whatever relevance the claim of non-sectarianism may have had before the *Everson* and *McCullum* decisions, it is entirely irrelevant today. At this point, we urge only that the claim of non-sectarianism is purely fictional.<sup>34</sup>

1. We submit that characterizing the Lord's Prayer as non-sectarian constitutes a cavalier disregard of the convictions of adherents to the Jewish faith. We know of no Jewish religious authority who agrees with that characterization. The prayer itself is preceded by the injunction: "And when thou prayest, thou shalt not be as the hypocrites are: for they love to pray standing in the synagogues<sup>35</sup> and in corners of the street, that they be seen of men" (St. Matthew 6:5). Even more important, designating as the "Lord" any human being violates a basic article of the Jewish faith.<sup>36</sup>

<sup>34</sup> "There is no such thing as a universally accepted religion." *Knowlton v. Baumhover*, 182 Iowa 691, 704 (1918). See also: Moehlman, *School and Church, The American Way* (1949), Chapter entitled "Can the Bible Return to the Classroom?"

<sup>35</sup> The Jewish religion prescribes prayer in synagogue. *Shulchan Aruch, Orech Chaim*, Chap. 52.

<sup>36</sup> One of the thirteen basic articles of Jewish faith, codified by Maimonides, reads: "I believe that the Lord is not a body; and no corporeal relations apply to Him; and there exists nothing that has any similarity to Him." *Mishneh Torah, Yad Hachazokoh*, Ch. 1. See also, Kohler, *Jewish Theology*, p. 29 (1918). The thirteen articles of faith are part of the daily prayer ritual of the Jews. *Jewish Encyclopedia* (1902), Vol. 2, pp. 150-151.

2. The New Jersey statute does not specify which version of the Bible or the Lord's Prayer is to be read, but obviously, some specific version of the Bible must be read. It is reasonable to assume (although it does not appear explicitly in the record, cf. R. 19) that the Protestant, or King James, version was used.<sup>37</sup> Characterizing the King James version of the Bible as "nonsectarian" is, we believe, an affront to adherents to the Catholic faith.<sup>38</sup> A Catholic child commits a grave sin if he knowingly owns or reads from the Protestant version of the Bible.<sup>39</sup> Catholic children who have received the Protestant Bible distributed by the Gideon Society in a number of schools, have been directed by their priests to return them,<sup>40</sup> and the distribution itself has been condemned by the Catholic Church.<sup>41</sup>

The fiction of the claimed "non-sectarianism" of the Bible has been recognized by the state courts which have considered the issue realistically.<sup>42</sup> The analysis by the

<sup>37</sup> All the reported cases on Bible reading in which the version of the Bible used is disclosed involved the Protestant version. Keesacker, *Legal Status of Bible Reading*, U. S. Office of Educ., Bull. No. 14 (1930).

<sup>38</sup> The Translators' dedicatory preface states that the purpose of the translation was to give "such a blow unto that Man of Sin [the Pope] as will not be healed" and "to make God's holy truth to be yet more and more known to the people, whom they ('Papist persons' at home or abroad) desire still to be kept in ignorance and darkness."

<sup>39</sup> Bouscaren and Ellis, *Canon Law, Text and Commentary* (1946), Canon 1399.

<sup>40</sup> Religious News Service, Dec. 6, 1950.

<sup>41</sup> Catholic Bulletin, May 28, 1940. Father L. J. Daby, local priest in a Massachusetts community where the Bible was distributed stated: "The issuing of the Gideon Bible, a sectarian Bible, in our public schools recently I take strong exception to. This is not Russia where children are being regimented, and we don't want such actions in this country." Religious News Service, May 17, 1950.

<sup>42</sup> *People ex rel. Ring v. Board of Education*, 245 Ill. 334 (1910); *State ex rel. Weiss v. District Board*, 76 Wisc. 177 (1890); *State ex rel. Freeman v. Scheve*, 65 Nebr. 853 (1902); *Harold v. Parish Board*, 136 La. 1034 (1915); *Board of Education x. Minor*, 230 Oh. St. 211 (1872).



Supreme Court of Illinois in *People ex rel. Ring v. Board of Education* is, we submit, the only one consistent with the facts. The Court said:

"It is further contended that the reading of the Bible in the schools constitutes sectarian instruction, and that thereby the provision of the Constitution is also violated which prohibits the payment from any public fund of anything in aid of any sectarian purpose. The public schools are supported by taxation, and if sectarian instruction should be permitted in them, the money used in their support would be used in aid of a sectarian purpose. The prohibition of such use of public funds is therefore a prohibition of the giving of sectarian instruction in the public schools.

"Christianity is a religion. The Catholic church and the various Protestant churches are sects of that religion. These two versions of the Scriptures are the bases of the religion of the respective sects. Protestants will not accept the Douay Bible as representing the inspired word of God. As to them it is a sectarian book containing errors and matter which is not entitled to their respect as a part of the Scriptures. It is consistent with the Catholic faith but not the Protestant. Conversely, Catholics will not accept King James' version, as to them it is a sectarian book inconsistent in many particulars with their faith, teaching what they do not believe. The differences may seem to many so slight as to be immaterial, yet Protestants are not found to be more willing to have the Douay Bible read as a regular exercise in the schools to which they are required to send their children, than are Catholics to have the King James version read in schools which their children must attend.

"The reading of the Bible in school is instruction. Religious instruction is the object of such reading, but whether it is so or not, religious instruction is accomplished by it. The Bible has its place in the school, if it is read there at all, as the living word of God, entitled to honor and reverence. Its words are entitled to be received as authoritative and final. The reading or hearing of such words cannot fail to impress deeply the pupils' minds. It is intended and ought to so im-

press them. They cannot hear the Scriptures read without being instructed as to the divinity of Jesus Christ, the Trinity, the resurrection, baptism, predestination, a future state of punishments and rewards, the authority of the priesthood, the obligation and effect of the sacraments, and many other doctrines about which the various sects do not agree. Granting that instruction on these subjects is desirable, yet the sects do not agree on what instruction shall be given. Any instruction on any one of the subjects is necessarily sectarian, because, while it may be consistent with the doctrines of one or many of the sects, it will be inconsistent with the doctrines of one or more of them. The petitioners are Catholics. They are compelled by law to contribute to the maintenance of this school, and are compelled to send their children to it, or, besides contributing to its maintenance, to pay the additional expense of sending their children to another school. What right have the teachers of the school to teach those children religious doctrine different from that which they are taught by their parents? Why should the state compel them to unlearn the Lord's Prayer as taught in their homes and by their Church and use the Lord's Prayer as taught by another sect? If Catholic children may be compelled to read the King James version of the Bible in schools taught by Protestant teachers, the same law will authorize Catholic teachers to compel Protestant children to read the Catholic version. The same law which subjects Catholic children to Protestant influences will subject the children of Protestants to Catholic control where the Catholics predominate. In one part of the state the King James version of the Bible may be read in the public schools, in another the Douay Bible, while in school districts where the sects are somewhat evenly divided, a religious contest may be expected at each election of a school director to determine which sect shall prevail in the school. Our Constitution has wisely provided against any such contest by excluding sectarian instruction altogether from the school."

The entire non-sectarian claim is belied by the history of Bible reading legislation and litigation in this country.

These have been but an incident of the anti-Catholic nativism and know-nothingness which has disgraced American history in the nineteenth century.<sup>43</sup> The first statute requiring Bible reading in the public schools was enacted by the notorious Massachusetts Know-Nothing legislature of 1855, which, in addition, passed laws restricting office-holding to native-born citizens, requiring twenty-one years' residence for the voting privilege and appointing a "Nunnery Committee" to investigate convents, parochial schools and seminaries.<sup>44</sup> The first reported case to sustain the validity of Bible reading in the public school<sup>45</sup> involved a suit brought by a Catholic parent in Ellsworth, Maine, at the urging of the local priest. The infuriated Protestant community seized the priest, tarred and feathered him and rode him out of town.<sup>46</sup> Some ten years earlier, in 1844, Bishop Kenrick of Philadelphia protested because Catholic children were required to read the Protestant Bible in the public schools. The Philadelphia Protestant community became aroused over this "Papist attack" on their Bible. Riots broke out in which Catholic churches and schools were burned and at least ten persons lost their lives.<sup>47</sup>

These incidents are cited merely to show the unreality of the claim of non-sectarianism. We have outgrown the period of virulent anti-Catholic prejudice which gave rise to these incidents. But it must not be supposed that the introduction of religious instruction and practices in the public schools does not even today bring with it interre-

<sup>43</sup> Beale, *History of Freedom of Teaching in American Schools* (1941), 102-103; Myers, *History of Bigotry in the United States* (1943) 176; Billington, *Protestant Crusade* (1938) 388.

<sup>44</sup> Billington, *supra*, p. 414.

<sup>45</sup> *Donahoe v. Richards*, 38 Me. 407 (1854).

<sup>46</sup> Williams, *The Shadow of the Rope* (1932), pp. 84-87.

<sup>47</sup> O'Gorman, *History of the Roman Catholic Church in the United States*, 356-360; Billington, *Protestant Crusade*, 220-230.



ligious tensions, ill-feeling and acrimony.<sup>48</sup> Of all places, the public schools should not be the arena for these conflicts. As Mr. Justice Frankfurter stated: "In no activity of the State is it more vital to keep out divisive forces than in its schools."<sup>49</sup>

#### D. Aid to all religions

The defense of "non-sectarianism", even if it were based on reality rather than fiction, has no relevancy to a determination of the validity of the New Jersey statutes under the First Amendment. The justification of "non-sectarianism" was adopted by State courts which were required to decide whether Bible reading or prayer recitation violated State constitutional prohibitions of "sectarian" teaching or practices in the public schools.<sup>50</sup> These cases were all decided before it was recognized that the Fourteenth Amendment subjected the States to the First Amendment's prohibition of laws respecting establishment of religion or prohibiting its free exercise.<sup>51</sup> Hence, the limitations upon governmental action in the field of religion imposed by the First Amendment were irrelevant and were not considered.

<sup>48</sup> For an example of Catholic-Protestant tensions rising out of Protestant baccalaureate services in the public schools, see *New York Times*, June 15, 16, 18, 20, 21, 1950. For examples of Christian-Jewish tensions arising from Nativity programs in the public schools, see *New York Herald Tribune*, Dec. 6, 1947; *Chelsea (Mass.) Record*, Dec. 6, 8, 10, 1949.

<sup>49</sup> Concurring in *McCullum* case, 333 U. S. 203 at 231.

<sup>50</sup> *Hackett v. Brooksville Grade School*, 120 Ky. 608 (1905); *Billard v. Board of Education*, 69 Kans. 53 (1904); *Church v. Bullock*, 104 Tex. 1 (1908); *Wilkerson v. City of Rome*, 152 Ga. App. 762 (1921); *People v. Stanley*, 81 Colo. 276 (1927); *Kaplan v. Independent School District*, 171 Minn. 142 (1927).

<sup>51</sup> *Cantwell v. Connecticut*, 310 U. S. 296, 303 (1940); *Minersville School District v. Gobitis*, 310 U. S. 586, 593 (1940); *Murdock v. Pennsylvania*, 319 U. S. 105, 108 (1943); *Everson v. Board of Education*, 330 U. S. 1 (1947); *People ex rel. McCullum v. Board of Education*, 330 U. S. 203 (1948).



Today, however, State statutes providing for Bible reading and prayer recitation in the public schools must be tested by the standard prescribed by the First Amendment as well as by State constitutions. Under the First Amendment, as defined in the *Everson* and *McCullum* cases, it is not conclusive that State action is "non-sectarian", i.e., non-preferential as among the religious sects. State action violates the ban of the First Amendment if it aids all religions on a non-preferential basis. It is unconstitutional if it is "a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faiths",<sup>52</sup> even if all religious groups are so aided.

We submit, therefore, that even if devotional Bible reading or Lord's Prayer recitations were acceptable to the three major faiths (without according consideration to the religious convictions of other than Protestants, Catholics and Jews) and could be designated "non-sectarian", they would still fall under the ban of the First Amendment, unless this Court erred in its interpretation of the First Amendment in the *Everson* and *McCullum* cases.

#### E. The real issue

This, we submit, is the real issue in this case: Shall this Court retrace its steps and retreat from the position it stated in *Everson* and repeated in *McCullum*? When the fact pattern of the *McCullum* case was presented to this Court it was clear that the program for religious instruction therein involved would not stand unless the views expressed by both the majority and minority in the *Everson* case were repudiated. Accordingly, the appellees there argued that historically the First Amendment was intended to forbid only government preference of one religion over another, not impartial governmental assistance to all religions. This Court gave "full consideration" to the argu-

<sup>52</sup> *McCullum* case, 333 U. S. at 210.

ments presented but found no reason to change its conclusions.<sup>53</sup>

Twice rejected by this Court, this narrow interpretation of the First Amendment has, however, found ready acceptance and passionate defense particularly in sectarian circles.<sup>54</sup>

<sup>53</sup> 333 U. S. 203 at 211.

<sup>54</sup> See, e.g., Statement of Catholic Bishops, *supra*:

"To one who knows something of history and law, the meaning of the First Amendment is clear enough from its own words: 'Congress shall make no laws [sic] respecting an establishment of religion or forbidding [sic] the free exercise thereof.' The meaning is even clearer in the records of the Congress that enacted it. Then and throughout English and Colonial history 'an establishment of religion' meant the setting up by law of an official Church which would receive from the government favors not equally accorded to others, in the co-operation between government and religion—which was simply taken for granted in our country at that time and has, in many ways, continued to this day. Under the First Amendment, the Federal Government could not extend this type of preferential treatment to one religion as against another, nor could it compel or forbid any state to do so.

"If this practical policy be described by the loose metaphor 'a wall of separation between Church and State', that term must be understood in a definite and typically American sense. It would be an utter distortion of American history and law to make that practical policy involve the indifference to religion and the exclusion of cooperation between religion and government implied in the term 'separation of Church and State' as it has become the shibboleth of doctrinaire secularism. \* \* \*

"We, therefore, hope and pray that the novel interpretation of the First Amendment recently adopted by the Supreme Court will in due process be revised. To that end we shall peacefully, patiently and perseveringly work. \* \* \*

"We call upon our Catholic people to seek in their faith an inspiration and a guide in making an informed contribution to good citizenship. We urge members of the legal profession in particular to develop and apply their special competence in this field. We stand ready to cooperate in fairness and charity with all who believe in God and are devoted to freedom under God to avert the impending danger of a judicial 'establishment of secularism' that would ban God from public life."

See also: O'Neill, *Religion and Education Under the Constitution* (1949); Parsons, *The First Freedom* (1948); Murray, *Law or*

It is unfortunate that considerable bitterness and lack of good taste has characterized much of the discussion.<sup>55</sup> But the issue once more is before the Court and once more the Court is called upon to reaffirm the principles announced unanimously and definitively in the *Everson* case.

The principle of the separation of religion from government and the obligation of neutrality between religious and non-religious groups imposed by that principle are not the recent invention of this Court.<sup>56</sup> They are based

*Prepossession?* 14 Law and Contemp. Problems, 23 (1949); Van Dusen, *God in Education* (1951); Pike, *Secularization and the Church*, Bulletin of General Theological Seminary, June 1951, 21.

<sup>55</sup> See, e.g., O'Neill, *Religion and Education Under the Constitution*, *passim*.

<sup>56</sup> Besides the references in Mr. Justice Frankfurter's concurring opinion in the *McCullum* case, 333 U. S. 203, 218-219, see, e.g., Madison: " \* \* \* strongly guarded \* \* \* is the separation between Religion and Government in the Constitution of the United States." Fleet, *Madison's "Detached Memoranda"*, 3 William & Mary Quarterly 534, 555 (3rd Ser. 1946); Philip Schaff: " \* \* \* the state must be equally just to all forms of belief and unbelief which do not endanger the public safety", *Church and State in the United States*, 10 (1888); Francis Lieber: "It belongs to American liberty to separate entirely that institution which has for its object the support the diffusion of religion from the political government. \* \* \* No worship shall be interfered with, either directly by persecution; or indirectly by disqualifying members of certain sects, or by favoring one sect above others; and no church shall be declared the church of the state, or the established church; nor shall the people be taxed by the government to support the clergy of all churches, as in the case in France"; *Civil Liberty and Self-Government* (1852); James Bryce: "It is accepted as an axiom by all Americans that civil power ought to be not only neutral and impartial as between different forms of faith, but ought to leave these matters entirely on one side, regarding them no more than it regards the artistic or literary pursuits of the citizens. There seem to be no two opinions on this subject in the United States"; *The American Commonwealth*, Vol. 2, p. 766 (3rd ed. 1894); David Dudley Field: " \* \* \* the greatest achievement ever made in the cause of human progress is the total and final separation of church and state. If we had nothing else to boast of, we would lay claim with justice that first among the nations we of this country made it an article of organic law that the relations between man and his Maker were a private con-



on the concept expressed by Madison in the statement that religion is "not within the cognizance of civil government,"<sup>57</sup> and of the Presbytery of Hanover against the same Assessment Bill which was the subject of Madison's Remonstrance:

"The end of Civil government is security to the temporal liberty and property of Mankind; and to protect them in the free exercise of Religion. Legislators are invested with power from their Constituents for these purposes only; and their duty extends no farther. Religion is altogether personal, and the right of exercising it unalienable; and it is not, cannot, and ought not to be resigned to the will of the society at large; and much less to the Legislature, which derives its authority wholly from the consent of the People; and is limited by the Original intention of Civil Associations  
\* \* \* " 58

That this principle is based on friendliness to religion rather than on enmity, is evident from its so warm an espousal by religious bodies.<sup>59</sup> It is even more evident from the position of strength and influence which religion has achieved in the United States under the protection of the guaranty of religious liberty and separation of church and state.

By and large, the American people have been faithful to the unique and radical experiment formalized in the "establishment" and religious liberty provision of the First

cern, into which other men have no right to intrude. To measure the stride thus made for the Emancipation of the race, we have only to look back over the centuries that have gone before us, and recall the dreadful persecutions in the name of religion that have filled the world." Quoted in Stokes, Vol. 1, p. 37.

<sup>57</sup> Memorial and Remonstrance, paragraph 8.

<sup>58</sup> *American State Papers on Freedom in Religion* (1949), p. 110. See also *Petition of Sundry of the Inhabitants of Rockingham County against the Assessment Bill* (quoted in Stokes, *Church and State in the United States*, Vol. 1, p. 363): " \* \* \* the power of Civil Government relates only to Men's Civil Interests. \* \* \* "

<sup>59</sup> *Ibid.* See also, *Petition of the General Committee of the Baptists against the Assessment Bill*, quoted in Stokes, Vol. 1, p. 373.



Amendment.<sup>60</sup> So conclusive was Madison's victory in the Virginia legislature that in the more than a century and a half since the Amendment was adopted, Congress has never enacted—nor indeed been called upon to consider—a bill for the support of teachers of religion.<sup>61</sup> Under this system of mutual independence of church and government religion has flourished in this country to an extent unparalleled elsewhere.<sup>62</sup> In 1790 not more than one out of eight

<sup>60</sup> *Everson*, 330 U. S. 1 at 14. See, also, Schaff, *Church and State in the United States* (1888), p. 15.

"To be just, the state must either support all or none of the religions of its citizens. Our government supports none, but protects all."

<sup>61</sup> The latest Congressional expression on the question was its enactment in July, 1950, of the Organic Act of Guam (Public Law 630 of the 81st Congress), Section 5; subdivision (p) of which provides: "No public money or property shall ever be appropriated, supplied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, sectarian institution or association, or system of religion, or for the use, benefit or support of any priest, preacher, minister or other religious teacher or dignitary as such." In December, 1950, resolutions for public aid to religious education and inclusion of religious teaching in the public schools were defeated at the White House Mid-Century Conference on Children and Youth. This conference, representing every area of American life, instead affirmed the principle of separation and the preservation of the American secular public school system. *New York Times*, December 1, 6, 8, 1951.

<sup>62</sup> By 1830, DeTocqueville could note that "there is no country in the whole world in which the Christian religion retains a greater influence over the souls of men than in America." *Democracy in America* (1 Amer. ed. 1851), Vol. I, p. 332. A half century later, Bryce remarked that while the "legal position of a Christian church is in the United States simply that of a voluntary association or group of associations corporate or unincorporate, under the ordinary law", yet "the influence of Christianity seems to be \* \* \* greater and more widespread in the United States than in any part of western Continental Europe, and I think greater than in England." *American Commonwealth* (1st Ed.) 561. See, also, Schaff, *Church and State in the United States* (1888), p. 55.

"\* \* \* the American nation is as religious and as Christian as any nation on earth; and in some respects even more so, for the very reason that the profession and support of religion are left entirely free."

Americans<sup>63</sup> and possibly as few as one out of twenty-five<sup>64</sup> belonged to any church. Today, at least one out of every two Americans is a church member.<sup>65</sup> Mr. Justice Rutledge was clearly right when he stated that complete separation between religion and the state is best, not only for the state, but for religion as well.<sup>66</sup>

Acceptance of the contention that the First Amendment permits governmental aid to religion on a non-preferential basis would require a determination that an affirmative grant of legislative power, theretofore lacking, was made in language prohibiting legislative action. For, absent the First Amendment, it is clear that Congress has no power to aid religion, preferentially or non-preferentially. As Madison put it, "there is no shadow of right in the general government to intermeddle with religion."<sup>67</sup> "The Government," said Madison, "has no jurisdiction over it."<sup>68</sup> Indeed, there was a strong feeling that the First Amendment was "altogether unnecessary inasmuch as Congress has no authority whatever delegated to them by the Constitution to make religious establishments."<sup>69</sup> Dissatisfied with the absence of conferred power, the states demanded

<sup>63</sup> Stokes, *Church and State in the United States*, Vol. 1, 229-230.

<sup>64</sup> Garrison, *History of Anti-Catholicism in America*, Social Action, p. 9 (Jan. 15, 1948).

<sup>65</sup> U. S. Department of Commerce, *Census of Religious Bodies*, 18 (1936); *Yearbook of American Churches* (1951 edition), p. 239.

<sup>66</sup> Dissenting in *Everson* case, 330 U. S. 1 at 59.

<sup>67</sup> Writings of Madison, Vol. 5, p. 176 (Hunt ed. 1920).

<sup>68</sup> *Ibid.*, p. 132.

<sup>69</sup> 1 Annals of Congress, 729 (1789).

"But it [the Constitution] is neither hostile nor friendly to any religion; it is simply silent on the subject, as lying beyond the jurisdiction of the general government." Schaff, *Church and State in the United States* (1888), pp. 39-40.

an express prohibition which it was the intent of the framers of the First Amendment to supply.<sup>70</sup> The result of adoption of the premise underlying the decision of the New Jersey Supreme Court in the present case would be to turn a prohibition against laws respecting an establishment of religion into a grant of power so passionately sought to be withheld from the Federal Government.<sup>71</sup>

If this Court were to adopt the limited interpretation of the First Amendment urged by the proponents of Bible reading and similar "non-preferential" aid to religion, it would be enacting into the Constitution what the Congress which framed the amendment specifically refused to enact, although it had two opportunities to do so. Twice when the First Amendment was debated in the Senate it was proposed to substitute either of the following for the House versions:

"Congress shall make no law establishing one Religious Sect or society in preference to others, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."

And:

"Congress shall make no law establishing any particular denomination or religion in preference to another."

<sup>70</sup> Beard, *The Republic*, 166, 170 (1944): "The Constitution does not confer upon the Federal Government any power whatever to deal with religion in any form or manner. \* \* \* The First Amendment merely confirms the intention of the framers." See also Bancroft's letter to Schaff: " \* \* \* Congress therefore from the beginning was as much without the power to make a law respecting the establishment of religion as it is now after the amendment has passed." Schaff, *Church and State in the United States*, at p. 137.

<sup>71</sup> See Hamilton's prophetic warning in *The Federalist No. 84*: "I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than was granted. For why declare that things shall not be done which there is no power to do?" *Federalist Papers* 559 (Mod. Lib. ed. 1937).



or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."

These versions expressly and unambiguously spell out the narrow, limited interpretation of the First Amendment. Yet both proposals were rejected.<sup>72</sup> We submit that this

<sup>72</sup> Journal of Proceedings of the First Session of the United States Senate, pp. 63, 70 (for August 25 and, September 3, 1791). The text of the Journal entry is as follows:

The resolve of the House of Representatives \* \* \* was read, as followeth:

\* \* \* \* \*

"Art. III. Congress shall make no law establishing religion, or prohibiting the free exercise thereof; nor shall the rights of conscience be infringed."

\* \* \* \* \*

The Senate resumed the consideration of the resolve of the House of Representatives on the amendments to the Constitution of the United States.

\* \* \* \* \*

On motion to amend Article the third, and to strike out these words: "Religion, or prohibiting the free exercise thereof"; and insert "No religious sect or society in preference to others."

It passed in the negative.

On motion for reconsideration:

It passed in the affirmative.

On motion that Article the third be stricken out:

It passed in the negative.

On motion to adopt the following, in lieu of the third Article: "Congress shall not make any law infringing the rights of conscience, or establishing any religious sect or society."

It passed in the negative.

On motion to amend the third Article, to read thus: "Congress shall make no law establishing any particular denomination or religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."

It passed in the negative.

On the question upon the third Article as it came from the House of Representatives:

It passed in the negative.

On motion to adopt the third Article proposed in the resolve of the House of Representatives, amended by striking out these words, "Nor shall the rights of conscience be infringed."

It passed in the affirmative.



Court may not write into the Constitution what both the Constitutional convention and the Congress which framed the First Amendment specifically rejected.

## CONCLUSION

The reading of a few verses daily from the Bible or the recitation of the Lord's Prayer in the public schools might not seem to present a major threat to the constitutional guaranty of separation and religious liberty. Some courts have characterized the encroachment as trivial.<sup>73</sup> The practice is not deemed trivial to those whose religious convictions have caused them to suffer persecution rather than submit. But even if the encroachment were in itself minor, its danger to the American secular public school system and the constitutional principle of separation and religious liberty would not be less. We are dealing with an area in which every sanctioned minor encroachment permits a precedent justifying further encroachment.<sup>74</sup> The statute is "a first step in the direction of an 'establishment of religion'; and . . . the first step in that direction is the fatal step, because it logically involves the last step."<sup>75</sup>

Washington issued a proclamation recommending a day of thanksgiving in language embracing all who believed in a Supreme Ruler of the universe, but to Adams this was a precedent justifying a proclamation calling for Christian worship,<sup>76</sup> and Mr. Justice Brewer of this Court found these declarations to be precedents for the proposition that

<sup>73</sup> See, e.g., *Wilkerson v. City of Rome*, 152 Ga. 763. The New Jersey Supreme Court in the present case emphasized that the religious exercise provided by the statute was "short" (R. 37, 39).

<sup>74</sup> See Dissenting Opinion of Mr. Justice Rutledge in *Everson* case, 330 U. S. 1 at 57-58.

<sup>75</sup> *Board of Education v. Minor*, 23 Oh. St. 211, 250 (1872).

<sup>76</sup> Fleet, *Madison's "Detached Memoranda"*, 3 *William & Mary Quarterly*, 534, 561 (3rd ser., 1946).

"we are a Christian nation".<sup>77</sup> In 1864 "In God We Trust" was placed upon our coins. It has now been cited by the New Jersey Supreme Court as authority for public school Bible reading and Lord's Prayer recitation,<sup>78</sup> and by the New York Court of Appeals to justify released time from public school for religious education.<sup>79</sup>

An affirmance here, however, would set a precedent of an entirely new kind. It would give the highest judicial sanction to a breach in the wall of separation. Thanksgiving proclamations, rubrics on coins and the like have not received such sanction. They are not susceptible to judicial consideration. They have occurred and continued, not because they are constitutional but because their constitutionality cannot be attacked in the courts. If this Court now approves devotional exercises in public schools, it will supply that judicial sanction which is all that is needed for much greater violations of the separation principle. The basic theory of the decision below is unrelated to the gravity or triviality of Bible reading. If it is upheld, much more than Bible reading will have been permitted.

It is with remarkable prescience that Madison warned that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."<sup>80</sup> Today, as in Madison's day "we must say that the will of the Legislature is the only measure of their authority; and that in the plenitude of this authority, they may sweep away all

<sup>77</sup> *Church of Holy Trinity v. United States*, 143 U. S. 457; 468 (1892). Jefferson characterized the contention that Christianity is part of the common law as a "judicial forgery" growing out of a "conspiracy \* \* \* between Church and State". *Writings of Jefferson* (ed. 1903), Vol. 16, p. 51.

<sup>78</sup> R. 27.

<sup>79</sup> Concurring opinion of Judge Desmond in *Zorach and Gluck v. Clauison*, 303 N. Y. 161 at 181 (1951).

<sup>80</sup> Memorial and Remonstrance, par. 3.

our fundamental rights; or that they are bound to leave this particular right untouched and sacred."<sup>81</sup>

We submit that it was the purpose of our Constitution and the First Amendment to leave the right to religious liberty and a state separated from the church "untouched and sacred". Adherence to that peculiarly American principle in the United States has resulted in the elevation of religion to a status of strength and influence unparalleled in the world, and in the evolution of a system of public education for all children free of sectarian strife and controversy. Preservation of that enviable position of religion and school requires continued faithful adherence to the American principle. Faithful adherence to that principle requires reversal of the judgment herein.

Respectfully submitted,

LEO PFEFFER,  
WILL MASLOW,  
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*Attorneys for American Jewish Congress.*

New York, November, 1951.

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<sup>81</sup> *Ibid.*, par. 15.





[39486]

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# Supreme Court of the United States

OCTOBER TERM, 1951

No. 9

DONALD R. DOREMUS and ANNA E. KLEIN,  
*Appellants,*

*v.*

BOARD OF EDUCATION OF THE BOROUGH OF  
HAWTHORNE and the STATE OF NEW JERSEY,  
*Respondents.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE  
OF NEW JERSEY

BRIEF, *AMICUS CURIAE*, BY THE CITY OF NEW YORK  
ON-BEHALF OF THE BOARD OF EDUCATION OF THE  
CITY OF NEW YORK, WITH SPECIAL REFERENCE TO  
THE NEW YORK CITY PRACTICE OF READING A POR-  
TION OF THE BIBLE, WITHOUT COMMENT, AT ALL  
SCHOOL ASSEMBLIES

January 16, 1952

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APPEAL FROM THE SUPREME COURT OF THE STATE  
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**BRIEF, AMICUS CURIAE, BY THE CITY OF NEW YORK  
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THE NEW YORK CITY PRACTICE OF READING A POR-  
TION OF THE BIBLE, WITHOUT COMMENT, AT ALL  
SCHOOL ASSEMBLIES**

---

## Preliminary Statement

The City of New York, a political subdivision of the State of New York, by its responsible and authorized law officer, the Corporation Counsel of The City of New York, sponsors this brief on behalf of the Board of Education of the City of New York. *Rules of the Supreme Court, Rule 27, subd. 9d; New York City Charter, § 394.*

## The Question Presented

The question presented is not whether it is educationally desirable that the Bible should or should not be read in the public schools. The New Jersey Legislature has resolved this question of policy. The sole issue as it affects this *amicus* is whether the New Jersey Legislature in causing excerpts from the Old Testament of the Bible to be read is transgressing the 1st Amendment guaranteed of religious liberty or the ban against the establishment of a religion. In other words the issue is not the *wisdom* of Bible reading in the public schools but solely one of *power*.

## The Interest of the Amicus.

The educational affairs of the City of New York are under the general management and control of the Board of Education of the City of New York. The present Board of Education and the various predecessor educational boards of localities which were consolidated into The City of New York in 1898 have always maintained the practice of opening public school assemblies with the reading of a portion of the Bible without comment. This practice is continued today by virtue of Board of Education By-law § 90, subdivision 30, which reads as follows:

"The regular assemblies of all schools shall be opened by reading to the pupils a portion of the Bible without comment."

The Lord's Prayer is not read in the New York City schools except as it may be the portion of the Bible read for a particular assembly.

Accordingly, the Board of Education of The City of New York considers it a matter of vital concern to its proper administration of the City's school system that the decision of the Supreme Court of the State of New Jersey in this case, at least so far as it concerns "Bible reading," be affirmed and that its own practice be upheld.

## **The Secular Purpose of Bible Reading in New York City**

The schools of the City of New York have always, continuously and uninterruptedly, had a portion of the Bible read to their students without comment. Historically, this practice originated in colonial times when the schools were all church schools. The practice continued through the 1800's when the idea of free public schools under State control was developed, during the fight in the middle of the 19th century to eliminate sectarianism, and up to today when they constitute the main training ground for democratic development. Just as the schools have been changed from Church sponsorship into free public schools sponsored by the State, so the purpose in reading the Bible has undergone a comparable change. In the public schools the Bible is not regarded primarily as the sacred book of the three major religions in this country. The Bible is used today as one of the significant secular means (1) of bringing students into contact with a sphere of thought which is inextricably integrated with life itself, (2) of teaching moral and spiritual values, (3) of making children aware of an important literary achievement.

The public schools have a highly significant duty to teach not only organized subject matter such as the social sciences or literature and the cultural traditions of this country but also moral and spiritual values. Accordingly they are obliged to devise ways in which such education may be developed.

They are aware that this must be done within the framework of our Constitution which prohibits the establishment of a religion but which does not thereby mean the rejection of religion itself or of the multitude of subjects or studies which may have had their origin in religion or whose development has been influenced by religion, e.g. art,



music, literature. The public schools of the City of New York, like the Government of the United States, stand firmly for freedom of religious belief.

# (1)

## **As a means of teaching moral and spiritual values .**

The American people have rightly expected the schools of this country to teach moral and spiritual values to the youth of the land. The schools in general and the public schools in New York City in particular have accepted this responsibility. By moral and spiritual values we mean those values which when they abide in human behavior exalt and refine life and bring it into accord with the standards of conduct that are approved in our democratic culture.

Our first duty is to define what are the essential values upon which our society rests, and upon which substantial agreement exists among the people of the United States. One of the best statements of such values is contained in the report entitled "Moral and Spiritual Values in the Public Schools" published by the Educational Policies Commission of the National Education Association of the United States and the American Association of School Administrators, 1951. The City of New York is especially proud of this report since its Superintendent of Schools, William Jansen, served on the Commission which prepared the report. Political expression of these basic values may be found in the Declaration of Independence, our Constitutions, both National and State, and in many other state papers and documents which have contributed to our culture as a democracy and form the traditional creed of our nation. It is significant that these values have also been expressed in the Bible.

As expressed in this report the basic moral and spiritual value in American life is the supreme importance of the individual personality. This is the basic value common to both our Judaeo-Christian culture and our political philosophy. From this basic value other values necessarily follow: that each person should feel responsible for the consequences of his own conduct; that institutional arrangements are the servants of mankind; that mutual consent is better than violence; that the human mind should be liberated by access to information and opinion; that excellence in mind, character and creative ability should be fostered; that all persons should be judged by the same moral standards; that the concepts of brotherhood and the commonweal should take precedence over selfish interests; that each person should have the greatest possible opportunity for the pursuit of happiness, provided only that such activities do not substantially interfere with the similar opportunities of others; that each person should be offered the emotional and spiritual experiences which transcend the materialistic aspects of life.

How are these essential values to be brought home to our students? Character education and the imparting of moral and spiritual values take place as part of the entire educative process. Organized subjects, such as natural and social sciences, literature and music, and special guidance programs, hobbies, sports and special activities in the classroom, homeroom or school assembly, all leave their mark. So, too, with the reading of the Bible in the school assembly. It has ever been one of the traditional methods of bringing a sense of moral values to the students, because in the thought provoking narratives, poetry, proverbs and letters of the Bible we find expressed the inspiring ideals of integrity, loyalty, friendship, respect for the feelings and rights of others, sympathy with suffering and affliction, generosity, unselfishness and helpfulness, cheerfulness, love of work, courtesy, charity, chivalry, heroism, courage, love

of truth, reliability, love of right, refinement of thought and heart, love of fellow man, and other ideals which are touched upon only incidentally in the courses of study. Further, concrete examples of the lives of good men set us an example and invite imitation.

Typical selections or portions of the Bible read, to illustrate these ideals, are the Story of Joseph (Genesis, Ch. XXXVII); Bricks Without Straw (Exodus, Ch. V); The Ten Commandments (Exodus, Ch. XX, 1-18); The Golden Calf (Exodus, Ch. XXXII, 1-8, 15-20); Ruth and Naomi (Ruth, Ch. I); David and Goliath (Samuel 1, Ch. XVII); Solomon's Judgment Concerning The Two Mothers And The Child (Kings 1, Ch. III); Life of Job (Job, Ch. I); Beat the Swords into Plowshares (Isaiah, Ch. II); Daniel Cast Into the Lions' Den (Daniel Ch. VI); The Golden Rule (Matthew, Ch. VII, 1-12); The Prodigal Son (Luke, Ch. XV, 11-32); Good Samaritan (Luke, Ch. X, 33).

## (2)

### As literature

The value of the Bible as a masterpiece of English prose and as an aid in teaching pupils how to speak and write good English is too well established and is too deeply rooted a tradition to be ignored and upset at this late date. We "do not readily overturn the settled practice of the years." CARDOZO, J. in *Story v. Craig*, 231 N. Y. 33, 40 (1921).

In *An Introduction to English Literature*, by H. S. PANCOAST (3rd Ed., New York, 1907), the author states (p. 123):

"It is safe to say that the English translation of the Bible is the greatest monument of our prose literature. Its influence on prose literature has been incalculable. Many of the greatest masters of English prose have drawn from it as from a great storehouse, so that biblical illustrations and biblical phrases have been wrought into the very fabric of the literature.

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The style of our English Bible has a dignity, simplicity, and force that have seldom been approached and never excelled."

And again (p. 188):

"The *English Bible* not only influenced the course of history; it did much, as has already been said, to shape and settle the standards of English prose."

In *English Prose Style*, by HERBERT READ (London, 1928), the author states (p. 111):

"The various editions of the English Bible, from Coverdale's in 1539 to the Authorized Version of 1611, consolidated and established the English idiom which had gradually been formed during the fourteenth and fifteenth centuries; they exemplify all the characteristics of a true narrative style—concreteness, economy and speed. . . . the English Bible has been the greatest single influence on the development of English prose style, . . ."

And again (pp. 121-122):

"With the Brontes (the remark is true, at any rate of Charlotte as well as of Emily), a new vitality and stricter realism came into English fiction; it was a return to Swift and Defoe, or rather, to the fount of even these writers, for we know that the Bible was the most considerable literary influence in Emily Bronte's life. In prose fiction there has been since the middle of the last century no general lapse from this original English idiom among writers of distinction. This idiom, moreover, has been made the basis of American narrative style, not only in authors like Hawthorne, who may be said to belong to the English tradition, but in modern writers like Sherwood Anderson and Ernest Hemingway, who owe little or nothing directly to this tradition."

J. MIDDLETON MURRY, one of the ablest of the contemporary literary critics, in *The Problem of Style* (London,



1930), quotes the passage from the New Testament (Matt., xi, 28) beginning "Come unto me all ye that labour and are heavy laden, and I will give you rest", and then says in comment upon it (pp. 129-130):

"There the language itself has a surpassing beauty. The movement and sound of the first sentence is exquisite, I have no doubt a thousand times more beautiful than the Greek, which I have forgotten if I ever knew it. But still, but still—would it be so very different in its effect in the Greek? I doubt it. In whatever language that sentence was spoken to you, your depths would be stirred. Our common humanity reaches out after the comfort of the words; all that there is of weariness and disappointment, of suffering and doubt, in all men stretches out for some small share in this love that might have changed the world. Apply your coldest test to it, and it remains great style; and when a man appears who can use it again, perhaps the face of the earth will be changed, for assuredly there is a mystery in the love which finds expression in it."

The story tellers of the Bible have related stories of all types of persons: the wise and the foolish, the rich and the poor, the faithful and the treacherous, the designing and the generous, the pitiful and the prosperous, the innocent and the guilty, the spendthrift and the miser, the players of practical jokes and their discomforted victims, the sorry, the tired, the old, the exasperated young, friends who counted no cost for friendship, bad mannered children and children well brought up, a little boy who had a headache in a hayfield, a little servant girl who wanted so much her master's health that she dared to give him good if unpalatable advice.

There are countless proverbs in the Bible, many contained in that part of the Bible entitled "Proverbs", others

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\* "The Bible and the Common Reader," MARY ELLEN CHASE, Macmillan Co., 1944.

scattered elsewhere, maxims and aphorisms, some of great antiquity, some of other origin than Jewish. Proverbs as all know are one of the most ancient and perennial forms of literature, reflecting the sagacity and common sense of practical men of all ages in their attempt to get on reasonably well in life. Often do we quote them unconscious of their origin.

The words, phrases, images and similes in the Bible have become part and parcel of our common English speech. In our every day dealings we clarify and illuminate our talk with one another by the often unconscious use of its language. An unwelcome neighbor becomes "gall and wormwood" or "a thorn in the flesh"; a hated task, "a millstone about the neck"; we escape from one thing or another "by the skin of our teeth"; we earn our bread "by the sweat of our faces"; we "strain at gnats and swallow camels"; tired at night, we say that "our spirit is willing but our flesh is weak"; in moments of anger we remember that "a soft answer turneth away wrath"; we warn our children that if "they sow the wind they shall reap the whirlwind"; words fitly spoken are "like apples of gold in pictures of silver"; our friends are "the salt of the earth"; we refer to laboring men as "hewers of wood and drawers of water"; we long for the time when men "shall beat their swords into plowshares and their spears into pruning hooks".

Without a knowledge of the language of the Bible the best of our literature would be obscure. No liberal education is truly liberal without it.

### (3)

#### **As part of our American culture**

The Bible to Americans is a national monument. It paved the way for the Bill of Rights and in 17th and 18th

century America it supplied not only the names of our ancestors but the stout precepts by which they lived. It was the source of the convictions that shaped the building of this country, of the faith that endured the first New England winters and later opened up the Great West. It laid the foundation of our educational system, built our earliest colleges and dictated the training within our homes. In the words alike of Jefferson and Patrick Henry, John Quincy Adams and Franklin it made better and more useful citizens by reminding man of his individual responsibility, his own dignity and his equality with his fellow man. Is it conceivable that Lincoln could have written his Gettysburg Address without his knowledge of the Bible and its rich overtones? The Bible is, indeed, so imbedded in our American heritage that not to recognize its place there becomes a kind of national apostasy, and not to know and understand it, in these days, when we give all for its principles of human worth and human freedom, is an act unworthy of us as a people.

### **The Legal Basis of Bible Reading in New York City**

Horace Mann, who was a leader in the fight to establish free public schools and to eliminate sectarianism in them, nevertheless said of the Bible that it was an invaluable book for forming the character of children and should be read without comment in the schools. This didn't mean, he went on to say, that it was necessary to teach the Bible.

CUBBERLEY, "*Public Education in the United States*," 1919, p. 176.

It was undoubtedly Horace Mann's influence which motivated the New York Legislature, over one hundred years ago, to ban sectarianism from the New York public

schools by law and at the same time preserve the historical and traditional place of the Bible in our public schools (L. 1851, ch. 386, § 18).

Sectarian teaching in the public schools has long since been eliminated but the reading of the Bible in the public schools without note or comment has continued to date. This statute has been reenacted three times by the legislature; first, in 1882 (L. 1882, ch. 410, the Consolidation Act of the City of New York), then in 1897 (L. 1897, ch. 378, the Greater New York Charter) and again in 1901 when it became § 1151 of the Greater New York Charter (L. 1901, ch. 466).

New York Education Law § 868 (now § 2554) prescribes generally the powers and duties of the Board of Education. Among these we find, in subdivision 13, that the Board has the power and it is made its duty "to prescribe such regulations and by-laws as may be necessary \* \* \* for the general management, operation, control, maintenance and discipline of the schools \* \* \* and

"15. a. To perform such other duties and possess such other powers as may be required to administer the affairs placed under its control and management, to execute all powers vested in it, and to promote the best interests of the schools and other activities committed to its care, \* \* \*"

Pursuant to this rule making power, the Board of Education adopted By-law §90. subd. 30 which reads as follows:

"The regular assemblies of all schools shall be opened by reading to the pupils a portion of the Bible without comment."

It is thus under the extant By-law that the Board of Education of the City of New York requires that all public



assemblies in the schools be opened by a reading of a portion of the Bible without comment.

An attack upon the constitutionality of Bible reading in the New York City public schools was rejected by the New York Courts in *Lewis v. Board of Education*, 157 N. Y. Misc. Rep. 520 (Sup. Ct., N. Y. Co., 1935), modified 247 App. Div. 106 (1st Dept., 1936); appeal dismissed, 276 N. Y. 490 (1937).

## ARGUMENT

The reading of portions of the Bible, without comment, in public school assemblies is constitutionally unobjectionable; that, as an incident to Bible reading, religion generally, or religious thinking, may thereby be aided is subordinate to the proper educational purpose served.

### (1)

The First Amendment of the United States Constitution provides:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; • • •”

While this amendment refers specifically only to Congress, it is now well settled that the prohibitions imposed upon Congress by the First Amendment constitute, by virtue of the Fourteenth Amendment, prohibitions against the States or those acting under color of State power.

*Cantwell v. Connecticut*, 310 U. S. 296 (1940);

*Murdock v. Pennsylvania*, 319 U. S. 105 (1943);

*Jamison v. Texas*, 318 U. S. 413 (1943);

*West Virginia State Board of Education v. Barnette*, 319 U. S. 624 (1943);

*Everson v. New Jersey*, 330 U. S. 1 (1947);  
*McCullum v. Board of Education*, 333 U. S. 203  
 (1948).

If we understand correctly the argument of the appellants (opponents of Bible reading) it is something like this: pointing to the "wall of separation between Church and State" they say that the "wall" is the barrier which precludes Bible reading at school assemblies. No other consideration, they say, is pertinent to this field of argument. They rest their entire case on the "wall" which they assert must be kept "high and impregnable."

We are not unmindful that, in referring to the breadth and scope of the First Amendment, some of the Justices of this Court in the *Everson* case (330 U. S. at pp. 15-16) and in the *McCullum* case (333 U. S. at pp. 210-211) stated:

"Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"

This is a far cry from supporting the argument now advanced by the opponents of Bible reading. The metaphorical concept embodied in the expression "wall of sepa-

ration between church and State" must be evaluated, we insist, with regard to the precise factual situation in each particular case and cannot be applied indiscriminately. To do otherwise would be to argue in a vacuum.

Moreover, the unrestricted, unlimited and unreasoned acceptance of the metaphor would fly in the face of our national tradition and give rise to all sorts of incongruous results. The unmitigated unthinking of our opponents in urging the elevation of the metaphor to an absolute leads to absurdity. For example, it would be unlawful for Congress to appropriate moneys for the payment of salaries to the Chaplains in our Armed Forces or to those who, from earliest times, have opened each session of the Congress with prayer. Religious services at public hospitals to comfort the sick and dying and in penal institutions to give spiritual aid to the imprisoned and solace to the condemned would be banned. The New York State and United States provisions for the form of an oath, thereby invoking moral sanctions for the proper administration of justice and the machinery of government would be unconstitutional. (New York Civil Practice Act, §§ 360-365; 5 U. S. C. 16\*; 28 U. S. C. 453.) Tax exemption for religious institutions and tax deductions for contributions to religious organizations would be invalid (26 U. S. C. 101 subd. 6; N. Y. Tax Law, § 360 subd. 10). Invoking of the Deity in Thanksgiving proclamations or to assist our Armed Forces would be stopped. Our trust in God would have to be eliminated from our coins. The Constitution of the State of New York would in itself be unconstitutional at the point in its preamble where it expresses gratitude to an "Almighty God" for our freedom. Laws making Christmas and Sunday legal holidays would be bad (New York General Construction Law, § 24). Laws providing

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\* The oath prescribed by 5 U.S.C. 16 for any person elected or appointed to any office of honor or profit either in the civil, military or naval service, except the President of the United States, is as follows: "I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States \* \* \* So help me God."

for the incorporation of ecclesiastical bodies would have to be stricken out. Denominational colleges would be barred from receiving students under the "G.I. Bill of Rights." Religious groups would be barred from holding meetings in public parks. But see *Saia v. New York*, 334 U. S. 558 (1948). Public school children would be barred from singing "America", part of which is a prayer to God to "protect us by Thy might," "God Bless America" and so much of "America the Beautiful" which recites:

"God shed his grace on thee and crown thy hood  
with brotherhood."

That such illogical results were not contemplated by this Court in its definition of the meaning of the First Amendment is clear from the holding in the *Everson* case in which this Court first referred to the wall separating Church and State, see *supra*, p. 13. In the *Everson* case this Court sustained the power of a local school board to pay the transportation charges of children attending a Catholic parochial school. Can it be denied that the religious school thereby received an indirect or incidental benefit?

Furthermore, the Court did not overrule either *Cochran v. Louisiana*, 291 U. S. 370 (1930) or *Bradfield v. Roberts*, 175 U. S. 291 (1899). In the *Cochran* case this Court sustained the State's purchase of textbooks for all school children including those attending parochial schools. And in the *Bradfield* case an appropriation to a Catholic hospital was sustained.

Nor has this Court ever overruled its earlier statement that ours is a religious nation and that the stability of our government rests upon the basis of a belief in God. *Church of the Holy Trinity v. U. S.*, 143 U. S. 457 (1892).



## (2)

In ascertaining the true meaning of the First Amendment we must keep in mind the intent of the people who adopted it, the objects sought to be accomplished and the evils sought to be prevented or remedied.

A comprehensive statement of the historical background of the First Amendment need not be indulged in here since the subject has received extensive treatment by this Court. *Reynolds v. United States*, 98 U. S. 145, 162-165 (1878); *Everson v. New Jersey*, 330 U. S. 1, 8-13, 33-43 (1947); *McCullum v. Board of Education*, 333 U. S. 203, 244-248 (1948).

When the Constitution was adopted there were still established churches in five of the States and a few years earlier there had been nine of them in the thirteen colonies. (O'NEILL, "*Religion and Education under the Constitution*", p. 97.) "Establishment" of a church or religion always and necessarily means an act of government favoring one particular church or group of churches. Historically, that is exactly what the amendment meant to the framers of the Constitution and to the Congress of the people who adopted it. There is only one exposition in the annals of Congress of the meaning and no contemporary proofs to the contrary. Madison, the author, said during the first Congress (Annals of Congress for August 15, 1789; Volume I, p. 758) that the amendment mandated:

"That Congress shall not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."

The necessity for the amendment, he went on to say, was a fear by some that Congress might otherwise have power to "make laws of such a nature and might infringe the rights of conscience and establish a national religion" and he repeated that the amendment was intended "to prevent these effects". Finally he noted that the amendment was being added because "the people feared one sect might obtain a pre-eminence, or to combine together, and establish a religion to which they would compel others to conform".

Such fears had indeed been expressed during the campaign to ratify the Constitution as originally drawn. (See VAN DOREN, *"The Great Rehearsal"*, pp. 217, 237). No one at that time or for years thereafter ever attributed to the First Amendment any broader meaning. Separation of Church and State is a figure of speech which the opponents of Bible reading have seized upon without regard to the context in which this Court has considered it as expressing the general intentment of the First Amendment. This phrase is not in the Constitution. Nor did the founding fathers intend, nor could they have intended that there shall be a *total* separation of Church and State to the extent of prohibiting governmental encouragement of, or cooperation with, religions generally. It did not mandate governmental hostility or indifference to religion or recognition of God. The Constitution did not decree that this is to be a godless nation.

Separation of Church and State is a relative concept. There is no such thing as a completely free church in a free state or a state without religious influences. Our churches must be built in accordance with our building codes and fire laws and indeed their legal incorporation is regulated by State law. On the other hand, the State has repeatedly availed itself of religion by invoking the moral sanctions of oaths, in looking to God as the creator of our "inalien-

able rights" (The Declaration of Independence) and in the many other ways previously alluded to which make up the warp and woof of our American way of life. Indeed the Constitution itself recognizes Sunday as a non-business day. *U. S. Const. Art. I, Sec. 7. cf. People v. Friedman*, 302 N. Y. 75 (1951), appeal dismissed for want of a substantial Federal question, 341 U. S. 907 (1951).

In *People v. Friedman, supra*, the New York Court of Appeals, in sustaining the constitutionality of the "Sunday laws" in the face of an attack that they violated the First Amendment, recognized that they may be said to have had a religious origin but that they since have come to serve a proper State purpose of providing for a regular day of rest. In upholding the Sunday laws, the Court said (302 N. Y. at p. 79):

"It does not set up a church, make attendance upon religious worship compulsory, impose restrictions upon expression of religious belief, work a restriction upon the exercise of religion according to the dictates of one's conscience, provide compulsory support, by taxation or otherwise, of religious institutions, nor in any way enforce or prohibit religion."

The rule which evolves from an analysis of the several cases in this Court and our national tradition would seem to require a recognition of the distinction between religion as a functional experience of mankind and religion as institutionalized by various churches and sects, between religion *per se* and sectarianism, between a recognition of our Judaeo-Christian culture and tradition and the dogma, creed, tenets and doctrines of the separate faiths.

## (3)

An accommodation must be struck between the First Amendment prohibition against the "establishment of religion" and the Tenth Amendment reservation of power to the people, in this case acting through their local Board of Education, to provide for the reading of a portion of the Bible, without comment, to the children at the assembly, since it has been demonstrated that such readings serve a proper educational purpose. That such readings may be said indirectly or incidentally to aid religion in some degree or coincide with the desires of religious leaders, is immaterial from a constitutional point of view. Illustrations of other situations involving some incidental benefit to religion which have been found to be constitutionally unobjectionable are *Everson v. Board of Education*, 330 U. S. 1 (1947); *Cochran v. Louisiana*, 281 U. S. 370 (1930); *Bradfield v. Roberts*, 175 U. S. 291 (1899); *People v. Friedman*, 302 N. Y. 75 (1951), appeal dismissed, 341 U. S. 907 (1951).

If we approach the problem of the true meaning of the First Amendment with respect to its guarantee of religious liberty, "or prohibiting the free exercise thereof [religion.]", we come to the same conclusion—namely that a reconciliation or accommodation of conflicting rights must be made. This, of course, is always a delicate matter.

Thus, in *Pierce v. Society of Sisters*, 268 U. S. 510 (1925) the State's attempt to compel all children to attend at the public schools had to give way to the parent's paramount right to educate his child in accordance with the parent's religious beliefs. In *West Virginia v. Barnette*, 319 U. S. 624 (1943), so much of the State's attempt to compel all children to salute the flag had to give way to the religious convictions of some children that saluting the flag was a form of worship to a graven image contrary to their



religious beliefs. In *Meyer v. Nebraska*, 262 U. S. 390 (1923), a State's attempt to have only English taught in all schools had to give way to the parent's right to have his children educated in other languages.

But in *Reynolds v. United States*, 98 U. S. 145 (1878), the individual's religious belief in polygamy had to give way to the State's ban on bigamy. In *Prince v. Massachusetts*, 321 U. S. 158 (1944), the individual's belief that his religion compelled his children to go on the public highways to propagandize their religion had to give way to the State's law prohibiting child labor. A person's religious scruples constituted no exemption from the State's requirement to bear arms or compulsory military training. In *re Summers*, 325 U. S. 561 (1945); *Hamilton v. Regents*, 293 U. S. 245 (1934). See also *Chaplinsky v. New Hampshire*, 315 U. S. 568 (1942).

From an analysis of the above cases we deduce the principle that a delicate accommodation must be arrived at in each case with due weight being given to the individual's right to freedom of religious expression on the one hand and the State's duty to all citizens of providing for their mutual health, safety, morals and general welfare. Stated in another way, the State's effort to provide for the general welfare, safety and morals of its citizens will not be struck down where as an *incident* to such program religion or a religion is indirectly aided. What is an incidental benefit in the latter cases, or in what direction the scales of accommodation are to be tipped in the former cases is a matter to be decided in each particular case, due regard being given to all the facts and circumstances in each case.

In many spheres the interests of the State and of religion coincide. We have mentioned the identity between the Judaeo-Christian concept and our democratic philoso-

phy that all men as the children of God are created equal with certain inalienable rights, that the supreme worth and inherent dignity of persons must be respected, that the wickedness of exploiting them must be denounced, that the golden quality of mercy, the inexorableness of the law that he that soweth the wind shall reap the whirlwind, must be recognized.

Other instances of the concededly valid exercise of State power which happen to coincide with the desires of religious leaders readily come to mind. That most religions sanctify marriage does not mean that the State cannot also make laws looking toward the permanency of the marriage ties. That Sunday is considered the Sabbath does not bar the State from making Sunday a day of rest. *People v. Friedman, supra.*

Still other examples of the complexity of the religious problem applied to the field of education were foreshadowed by Mr. Justice FRANKFURTER's dissent in the *Flag Salute* case (*West Virginia v. Barnette, supra*) and by Mr. Justice JACKSON in his concurring opinion in the *McCullum* case, *supra*.

In the *Barnette* case, Mr. Justice FRANKFURTER at page 659 (319 U. S. 624), said:

"Consider the controversial issue of compulsory Bible-reading in public schools. The educational policies of the states are in great conflict over this, and the state courts are divided in their decisions on the issue whether the requirement of Bible-reading offends constitutional provisions dealing with religious freedom. The requirement of Bible-reading has been justified by various state courts as an appropriate means of inculcating ethical precepts and familiarizing pupils with the most lasting expression of great English literature. Is this Court to overthrow such variant state educational policies by denying states the right to entertain such convictions in regard to their school systems, because of a

belief that the King James version is in fact a sectarian text to which parents of the Catholic and Jewish faiths and of some Protestant persuasions may rightly object to having their children exposed? On the other hand the religious consciences of some parents may rebel at the absence of any Bible-reading in the schools. See *Washington ex rel. Clithero v. Shoualter*, 284 U. S. 573. Or is this Court to enter the old controversy between science and religion by unduly defining the limits within which a state may experiment with its school curricula? The religious consciences of some parents may be offended by subjecting their children to the Biblical account of creation, while another state may offend parents by prohibiting a teaching of biology that contradicts such Biblical account. Compare *Scopes v. State*, 154 Tenn. 105, 289 S. W. 363. What of conscientious objections to what is devoutly felt by parents to be the poisoning of impressionable minds of children by chauvinistic teaching of history? This is very far from a fanciful suggestion for in the belief of many thoughtful people nationalism is the seed-bed of war."

In the *McCullum* case, Mr. Justice JACKSON warned against giving unrestricted scope to the Court's opinion without laying down some limitations. At pages 235-236 he said:

"If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits.

While we may and should end such formal and explicit instruction as the Champaign plan and can at all times prohibit teaching of creed and catechism and ceremonial and can forbid forthright proselyting in the schools, I think it remains to be demonstrated whether it is possible, even if desirable, to comply with such demands as plaintiff's completely to isolate

and cast out of secular education all that some people may reasonably regard as religious instruction. Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. Yet the inspirational appeal of religion in these guises is often stronger than in forthright sermon. Even such a 'science' as biology raises the issue between evolution and creation as an explanation of our presence on this planet. Certainly a course in English literature that omitted the Bible and other powerful uses of our mother tongue for religious ends would be pretty barren. And I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity—both Catholic and Protestant—and other faiths accepted by a large part of the world's peoples. One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.

But how one can teach, with satisfaction or even with justice to all faiths, such subjects as the story of the Reformation, the Inquisition, or even the New England effort to found 'a Church without a Bishop and a State without a King,' is more than I know. It is too much to expect that mortals will teach subjects about which their contemporaries have passionate controversies with the detachment they may summon to teaching about remote subjects such as Confucius or Mohammed. When instruction turns



to proselyting and imparting knowledge becomes evangelism is, except in the crudest cases, a subtle inquiry."

With special reference to the case at bar, we believe that it has been amply demonstrated that reading of the Bible without comment in public school assemblies serves a proper educational purpose and the fact that such reading from the Bible coincides with the desires of religious leaders is an inadequate reason for striking it down. See *Everson v. New Jersey*, *supra*, *Cochran v. Louisiana Board of Education*, *supra*.

As a generalized conception we believe that the reading of the Bible without comment at public school assemblies is constitutionally unobjectionable. It is only where some specific pattern of abuse may be shown that the Court's power to intervene should be invoked. The reading of the Bible must take its proper place in the overall pattern of influences which are brought to bear for the proper preparation of children for life in American democracy.

#### (4)

We are aware, of course, of the many State Court cases dealing with the problem of Bible-reading in the public schools. We have not cited or discussed such cases because the parties to this controversy, and especially the Attorney General of New Jersey, have amply covered this phase.

**CONCLUSION**

**The judgment appealed from should be affirmed.**

January 16, 1952.

Respectfully submitted,

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**OCTOBER TERM, 1951**

**NO. 9.**

**DONALD R. DOREMUS and ANNA E. KLEIN,**  
**Appellants,**

**v.**

**BOARD OF EDUCATION OF THE BOROUGH OF**  
**HAWTHORNE and THE STATE OF**  
**NEW JERSEY.**

**On Appeal From the Supreme Court of the State of**  
**New Jersey.**

**BRIEF FOR COMMONWEALTH OF PENNSYLVANIA**  
**AS AMICUS CURIAE.**

**HARRY F. STAMBAUGH**  
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**ROBERT E. WOODSIDE,**  
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**Attorneys for the**  
**Commonwealth of Pennsylvania.**

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# Supreme Court of the United States

OCTOBER TERM, 1951.

NO. 9.

DONALD R. DOREMUS and ANNA E. KLEIN,  
Appellants,

v.

BOARD OF EDUCATION OF THE BOROUGH OF  
HAWTHORNE and THE STATE OF  
NEW JERSEY.

On Appeal From the Supreme Court of the State of  
New Jersey.

BRIEF FOR COMMONWEALTH OF PENNSYLVANIA  
AS AMICUS CURIAE.

L

THE PRACTICE OF READING THE BIBLE IN THE PUBLIC  
SCHOOLS OF PENNSYLVANIA DOES NOT INFRINGE THE FIRST  
AMENDMENT.

Section 1516 of the Pennsylvania Act of March 10, 1949, (Pamphlet Laws of 1949, p. 30), 24 Purdon's Penna, Stat. Sec. 15—1516, known as the "Public School Code of 1949", provides:

"At least ten verses from the Holy Bible shall be read, or caused to be read, without comment, at

the opening of each public school on each school day, by the teacher in charge; Provided, That where any teacher has other teachers under and subject to direction, then the teacher exercising such authority shall read the Holy Bible, or cause it to be read, as herein directed,

It will be noted that—

(1) The Act expressly commands that the verses shall be read "without comment". Any exposition or interpretation and any instruction are expressly prohibited.

(2) The act does not direct that the Lord's Prayer be repeated or that any prayer be offered.

(3) The act does not specify any particular version of the Bible, but directs simply that ten verses of the "Holy Bible" be read.

It is therefore within the power of the school authorities or the teachers to avoid reading verses which may not be included in any version of the Bible or are not accepted by parents of children in attendance. As will be shown later, teachers have been instructed to do this.

This section is substantially a reenactment of Sections 1 and 2 of an earlier Act of May 20, 1913, P. L. 226. The Act of 1913, however, contained the following preamble:

"Whereas, The rules and regulations governing the reading of the Holy Bible in the public schools of this Commonwealth are not uniform; and



"Whereas, It is in the interest of good moral training, of a life of honorable thought and of good citizenship, that the public school children should have lessons of morality brought to their attention during their school-days \* \* \*"

Prior to the adoption of the Public School Code of 1949, public schools in Pennsylvania were regulated by the Code of May 18, 1911, P. L. 309.

This earlier code did not contain a provision about reading the Bible in the public schools, but the practice of reading the Bible in the opening exercises of the school day had prevailed in Pennsylvania for many years before.

This practice is discussed on page 3 of the report of Nathan C. Schaffer, Superintendent of Public Instruction of Pennsylvania for the year 1913; as follows:

#### "BIBLE READING IN THE PUBLIC SCHOOLS.

"The School Code [of 1911] makes no mention of the reading of the Bible. Heretofore this was a question to be decided by the local board of school directors. The last legislature passed an act making the daily reading of at least ten verses from the Holy Bible obligatory in all the public schools of Pennsylvania. The law does not specify what version is to be read. The catholic has as much right to read the Douay version as the protestant has to read King James version, or the Revised version. The teachers have been urged to select passages over which there is no doctrinal controversy. It is not the function of the public schools to teach religion. That should be left to the home, to the Sun-

day school and to the church with its various agencies.

"On the great questions of morality the protestant, the catholic and the jew are in agreement. Passages can be selected to enforce the great truths which lie at the foundation of our civic and ethical life. Helps have been prepared to aid the teachers in making selections suitable for school use during the opening exercises. \* \* \*" (3)

Further light on the history of this practice in Pennsylvania is furnished by the opinion of Judge Edwards of the Common Pleas of Lackawanna County in *Stevenson v. Hanyon*, 7 Pennsylvania District Reports, 585 (1898) :

"It is worthy of comment and reflects creditably upon the good sense of the rights of Pennsylvania, that, although our common school system has been in existence for many years, and that, as a general rule, in a large number of school districts throughout the State, portions of the holy scriptures, have been read as a part of the daily opening exercises, nobody up to this time has taken such interest in the question as to secure a decision upon it from our court of last resort."

The practice of reading selections from the Bible in the public schools was held not unconstitutional in several decisions of the Courts of Common Pleas:

*Hart v. School District*, 2 Chester County Reports, 521 (1895) ;

*Curran v. White*, 22 Pennsylvania County Reports, 201 (1898) ;

*Stevenson v. Hanyon*, 7 Pennsylvania District Reports, 585 (1898), quoted *supra*;  
*Stevenson v. Hanyon*, 4 Pennsylvania District Reports, 395 (1895), holding that sectarian religious service of any church may not be held in the public schools; see later opinion in last preceding case.

Section 108 of the Public School Code of 1949, 24 Purdon's Penna. Stat. Sec. 108, provides:

"No religious or political test or qualification shall be required of any director, visitor, superintendent, teacher, or other officer, appointee, or employe in the public schools of this Commonwealth."

This same provision was included as Section 2801 of the Pennsylvania School Code of May 18, 1911 (Pamphlet Laws of 1911, p. 309).

Section 1112 (a) of the Public School Code of 1949 further provides:

"That no teacher in any public school shall wear in said school or while engaged in the performance of his duty as such teacher any dress, mark, emblem or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination."

This provision, in substantially the same language, had appeared as Section 1 in the Act of June 27, 1895, P. L. 395. This Section 1 was preceded by the following preamble:

"Whereas, It is important that all appearances

of sectarianism should be avoided in the administration of the public schools of this Commonwealth."

Article 1, Section 3 of the Pennsylvania Constitution of 1874 provides: .

"All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience and no preference shall ever be given by law to any religious establishments or modes of worship."

Article 10, Section 2 of the same Constitution provides:

"No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school."

For many years before the adoption of the first Amendment in 1791, reading from the Bible had been an established procedure in the opening exercises of both public and private schools.

A few examples in early Colonial times may be cited.

The Dutch at Manhattan had established public schools as early as 1633, and supported them at public expense. A school was established by the Dutch at New Amstel on the Delaware. Reading the Bible and reciting the Lord's Prayer were part of the curriculum.<sup>1</sup>

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1. Wickersham, History of Education in Pennsylvania, pp. 9-12.



In 1689 William Penn directed the President of the Council of the Province of Pennsylvania "to set up" a public grammar school in Philadelphia, and this school was opened in 1689 to receive both boys and girls as pupils, some of whom paid for tuition and others were free pupils. This school was known as the "Friends' Public School" and later as the "William Penn Charter School". It was open to children of all religious denominations. In 1826 it maintained fourteen charity schools in different parts of the City of Philadelphia.<sup>2</sup> In 1841, one-tenth of the pupils were children of Friends.<sup>3</sup>

As early as 1718 Christopher Dock "the pious school master of Skippack" founded a school for the Mennonites.

Morning sessions began with reading, by the pupils, of pages from the Bible.<sup>4</sup>

In 1750 the "Academy and Charitable School of the Province of Pennsylvania", (which later became the University of Pennsylvania), was founded, chiefly by Benjamin Franklin, from funds raised by subscription. This school was nonsectarian.<sup>5</sup>

One of the rules of the school was as follows:

"The Roll being called, someone of the Professors or Tudors who may be appointed for that

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2. *Ibid.* 50.

3. *Ibid.* 41-42, 50.

4. Brumbaugh, *Life and Works of Christopher Dock*, pp. 15, 105-106.

5. Mulhern, *History of Secondary Education in Pennsylvania*, pp. 175, 182, 186.

Purpose \* \* \* shall go up into the Oratory in the Morning shall begin the Day by devotionally reading such Portions of the Holy Scriptures as he may select for that Purpose. In like Manner a short Portion of Scripture may be read in the Evening as often as it can be conveniently done. And both Morning and Evening a Conclusion shall be made by Prayer."

The complaining parent in *McCullum v. Board of Education*, 333 U. S. 203, was an atheist.

The religious beliefs of the parents in the *Doremus* and *Zorach* cases do not appear from the opinions.

Freedom of religion includes the right to believe in no religion.

The law recognizes the right of a parent to control the education of his child. However, this right is not absolute or unlimited. Compulsory education laws are an outstanding example.

When the child reaches the age when he can comprehend the great question of religion, he has the right to decide for himself whether he will believe or not believe. The right of the parent to control the early religious training of his child must not be indulged to the point of denying to the child the right to explore the field of religious beliefs and determining for himself what to believe. He has the right to know the teachings of the great religion which has shaped the history of this world and influenced the progress of mankind for centuries.

The parent does not have the right to insist that his child shall grow up in a religious vacuum. Parental predetermination should not be the only influence in molding the religious beliefs of the child. No child should be predestined to a life of unbelief, even by the fiat of his parents.

An unbelieving parent who would attempt to shield his child from all knowledge or influence of religion, would be one of the worst offenders against the freedom of religion. Freedom of religion means the right of every one to decide for himself whether to believe and what to believe.

If a child is not permitted at a proper age to read the Bible or to hear it read, and know of its teachings, how can he decide for himself whether he wishes to be an unbeliever?

In addition to the well considered opinion of the Supreme Court of New Jersey in the case at Bar, we refer to the following decisions in which the practice of reading the Bible in the Public Schools was held not to violate constitutional provisions:

*Kaplan v. Independent School District of Virginia*, 171 Minn. 142, 214 N. W. 18 (1927);

*Wilkerson v. City of Rome*, 152 Ga. 762, 110 S. E. 895 (1921);

*Knowlton v. Baumhover*, 182 Ia. 691, 166 N. W. 202 (1918);

*Hackett v. Brooksville Grade School District*, 120 Ky. 608, 87 S. W. 792 (1905);

*Billard v. Board of Education*, 69 Kan. 53, 76 Pac. 422;

*Freeman v. Scheve*, 65 Neb. 876, 91 N. W. 846,  
93 N. W. 169 (Final opinion).—

*Church v. Bullock*, 104 Tex. 1, 109 S. W. 115;

*Pfeiffer v. Board of Education*, 118 Mich. 560,  
77 N. W. 250;

*Spiller v. Inhabitants of Woburn*, 94 Mass. (12  
Allen) 127;

*Donahoe v. Richards*, 38 Me. 379;

*Board of Education v. Minor*, 23 Ohio St. 211.

A knowledge of the Christian religion, including the Bible, has long been recognized as a proper, and even necessary subject in public education.

Without a knowledge of Christianity, history, especially of the European nations, would be incomplete. The Christian religion also was a major influence in the settlement of the American Colonies and in the foundation of the government of the United States.

For many centuries the Bible has been regarded as the principal source of moral teachings.

As was said by Mr. Justice Storey in *Vidal v. Girard's Executors*, 43 U. S. (2 How.) 127 (1844):

“ \* \* \* Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college—its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, not sectarian, upon the general evidences of Christianity, from being read and taught in the college by lay teachers? \* \* \* ” (200)



## II.

### THE GOVERNMENT OF THE PROVINCE OF PENNSYLVANIA.

In addition to providing for popular rule, the government of Pennsylvania, as conceived and established by William Penn, was marked by three distinctive features.

First, The Christian religion was part of the very foundation of the government;

Second, Religious freedom was guaranteed in each of the important documents or governmental acts which entered into the foundation of the Province;

Third, Provision was made for a system of public schools.

These outstanding features of Penn's Plan are indicated by the following excerpts:

The laws of the Duke of Yorke which were in force from 1676 to 1682 in the territory afterwards embraced within the limits of Pennsylvania contained this provision:

"Whereas the publique Worship of God is much discredited for want of painful & able Ministers to Instruct the people in the true Religion and for want of Convenient places Capable to receive any Number or Assembly of people in a decent manner for Celebrating Gods holy Ordinances These ensuing Lawes are to observed in every parish (Viz.)

"1. That in each Parish within this Government a church be built in the most Convenient part thereof, Capable to receive and accommodate two Hundred Persons." (18)

The Preamble to the Charter granted in 1682 by Charles II to William Penn cites:

"CHARLES THE SECOND, BY THE GRACE of god, King of England, Scotland, France and Ireland, defender of the faith, &c., To all to whome these presents shall come greeting. Whereas our Trustie and well beloved Subject, William Penn, Esquire, sonn and heire of Sir William Penn, deceased, out of a commendable desire to enlarge our English Empire, and promote such vseful comodities as may bee of benefitt to vs and our Dominions, as alsoe to reduce the Savage Natives by gentle and just manners to the love of civill Societie and Christian Religion hath humbley besought leave of vs to transport an ample Colonie vnto a certaine Countrey hereinafter described in the partes of America not yet cultivated and planted. \* \* \*" (81)

The preface to "The Frame of the Government of the Province of Pennsylvania, in America", which William Penn prepared in 1682 for the new Colony recites:

"When the great and wise God had made the world, of all his creatures it pleased him to choose man his deputy to rule it; and to fit him for so great a charge and trust, he did not only qualify him with skill and power, but with integrity to use them justly. \* \* \*

"This the apostle teaches us in divers of his epistles. The law (says he) was added because of transgression: \* \* \* But this is not all, he opens and carries the matter of government a little further: Let every soul be subject to the higher powers, for there is no power but of God. The

powers that be are ordained of God. Whosoever therefore resisteth the power, resisteth the ordinance of God. For rulers are not a terror to good works, but to Evil: wilt thou then not be afraid of the power? Do that which is good, and thou shalt have praise of the same.—He is the minister of God to thee for good. \* \* \* (91)

"This settles the divine right of government beyond exception, and that for two ends; first, to terrify evil-doers; secondly, to cherish those that do well; which gives government a life beyond corruption, and makes it as durable in the world, as good men shall be. So that *government seems to me a part of religion* itself, a thing sacred in its institution and end. For if it does not directly remove the cause, it crushes the effects of evil, and is as such (tho' a lower yet) an emanation of the same Divine Power, that is both author and object of pure religion \* \* \*

\* \* \*

"Thirdly, I know what is said by the several admirers of monarchy, aristocracy and democracy, which are the rule of one, a few, and many, and are the three common ideas of government, when men discourse on that subject. But I choose to solve the controversy with this small distinction, and it belongs to all three; any government is free to the people under it (whatever be the frame) where the laws rule, and the people are a party to those laws, and more than this is tyranny, oligarchy, and confusion. (92)

\* \* \*

“But next to the power of necessity (which is a solicitor that will take no denial) this induced me to a compliance, that we have (with reverence to God, and good conscience to men) to the best of our skill, contrived and composed the FRAME and LAWS of this government, to the great end of all government, viz: to support power in reverence with the people, and to secure the people from the abuse of power; that they may be free by their just obedience, and the magistrates honourable for their just administration: for liberty without obedience is confusion, and obedience without liberty is slavery. \* \* \*

The “Laws Agreed Upon In England”, also prepared in 1682, contain the provision:

“Thirty-fifth. That all persons living in this province, who confess and acknowledge the one almighty and eternal God, to be the creator, upholder and ruler of the world, and that hold themselves obliged in conscience to live peaceably and justly in civil society, shall in no ways be molested or prejudiced for their religious persuasion or practice in matters of faith and worship, nor shall they be compelled at any time to frequent or maintain any religious worship, place or ministry whatever.

“Thirty-sixth. That according to the good example of the primitive christians, and for the ease of the creation, every first day of the week, called the Lord’s day, people shall abstain from their common daily labour, that they may the better dispose themselves to worship God according to their understandings.” (102-103)



"The Great Law", which was the first statute enacted at the first session of the Assembly, held on December 7, 1682, declares:

"Whereas, the glory of Almighty God and the good of Mankind, is the reason & end of government, and therefore, government in itself is a venerable Ordinance of God, And forasmuch as it is principally desired and intended by the Proprietary and Governor and the freemen of the Province of Pennsylvania and territories thereunto belonging, to make and establish such Laws as shall best preserve true Christian and Civil Liberty, in opposition to all Unchristian, Licentious, and unjust practices, (Whereby God may have his due, Caesar his due, and the people their due,) from tyranny and oppression on the one side, and insolence, and Licentiousness on the other, so that the best and firmest foundation may be layd for the present and future happiness of both the Governor and people, of the Province and territories aforesaid, and their posterity.

\* \* \* \* \*

"Chap. I. Almighty God, being Only Lord of Conscience father of Lights and Spirits, and the author as well as object of all Divine knowledge, faith, and Worship, who only can enlighten the mind, and persuade and convince the understandings of people. In due reverence to his Sovereignty over the Souls of Mankind. \* \* \*

"Be it enacted by the Authority aforesaid, That no person, now, or at any time hereafter, Living in this Province, who shall confess and acknowledge one Almighty God to be the Creator, Upholder and

Ruler of the world, And who professes, him, or herself Obligated in Conscience to Live peaceably and quietly under the civil government, shall in any case be molested or prejudiced for his, or her Conscientious persuasion or practice. Nor shall hee or shee at any time be compelled to frequent or Maintain anie religious worship, place or Ministry whatever, Contrary to his, or her mind, but shall freely and fully enjoy his, or her, Christian Liberty in that respect, without any Interruption or reflection." (107-108)

The Charter of Privileges, granted by William Penn to the inhabitants of Pennsylvania and dated October 28, 1701, provides:

"BECAUSE no People can be truly happy tho' under the greatest Enjoyment of civil Liberties, if abridged of the Freedom of their Consciences, as to their religious Profession and Worship; And Almighty God being the only Lord of Conscience, Father of Lights and Spirits; and the Author as well as Object of all Divine Knowledge, Faith and Worship, who only doth enlighten the Minds, and persuade and convince the Understandings of People, I do hereby grant and declare, That no Persons, inhabiting in this Province or Territories, who shall confess and acknowledge One Almighty God, the Creator, Upholder and Ruler of the World; and profess him, or themselves, obliged to live quietly under the civil Government, shall be in any Case molested or prejudiced, in his or their Person or Estate, because of his or their conscientious Perswasion or Practice, nor be compelled to frequent or maintain any religious Worship, Place or Min-

istry, contrary to his or their Mind, or to do or suffer any other Act or Thing, contrary to their religious Perswasion." (99-100)

In *Updegraph v. Commonwealth*, 11 S. & R. 393 (1824), the Supreme Court of Pennsylvania held that "general" Christianity was part of the common law of Pennsylvania and sustained a conviction for blasphemy.

In the opinion Mr. Justice Duncan said:

"We will first dispose of what is considered the grand objection—the constitutionality of Christianity for, in effect, that is the question. Christianity, general Christianity, is and always has been a part of the common law of Pennsylvania. Christianity, without the spiritual artillery of European countries; for this Christianity was one of the considerations of the royal charter, and the very basis of its great founder, William Penn; not Christianity founded on any particular religious tenets; not Christianity with an established church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men. William Penn and Lord Baltimore were the first legislators who passed laws in favor of liberty of conscience; for before that period, the principle of liberty of conscience appeared in the laws of no people, the axiom of no government, the institutes of no society, and scarcely in the temper of any man. \* \* \* (400)

\* \* \* The first legislative act in the colony was the recognition of the Christian religion, and establishment of liberty of conscience. Before this, in 1646, Lord Baltimore passed a law in Maryland in favor of religious freedom, and it is a memorable

fact, that of the first legislators, who established religious freedom, one was a Roman Catholic and the other a Friend. \* \* \* (401)

\* \* \* This is the Christianity of the common law, incorporated into the great law of Pennsylvania, and thus, it is irrefragably proved, that the laws and institutions of this state are built on the foundation of reverence for Christianity. \* \* \* (402)

\* \* \* No preference is given by law to any particular religious persuasion; protection is given to all by our laws; it is only the malicious reviler of Christianity who is punished. By general Christianity is not intended the doctrine of worship of any particular church or sect \* \* \* (407)

William Penn's Frame of Government, written in England early in 1682, provided:

"Twelfth. That the governor and Provincial Council shall erect and order all *publick schools*, and encourage and reward the authors of useful sciences and laudable inventions in the said province." (95)  
(Emphasis added)

Before sailing for America, William Penn wrote a farewell letter to his wife and children, in which he said:

"Upon the whole matter I undertake to say that if we would preserve our government, we must endeavor it to the people. To do this, besides the necessity of presenting just and wise things, we must secure the youth: this is not to be done, but by the



amendment of the way of *education*; and that with all convenient speed and diligence. I say the government is highly obliged: it is a sort of trustee for the youth of the kingdom; who, though minors, yet will have the government when we are gone. Therefore, depress vice, and cherish virtue, that through good *education*, they may become good; which will truly render them happy in this world, and a good way fitted for that which is to come. If this is done, they will owe more to your memories for their *education* than for their estates." (33-34)  
(Emphasis added)

Penn's Plan for the establishment and the maintenance of a system of public schools was carried into the first two constitutions which were adopted by the people of Pennsylvania.

The provisions of these constitutions are as follows:

Constitution of 1776, Sec. 44:

"A school or schools shall be established in each county, by the legislature, for the convenient instruction of the youth, with such salaries to the masters paid by the public, as may enable them to instruct youth at low prices."

Constitution of 1790, Art. VII, Sec. 1:

"The legislature shall, as soon as conveniently may be, provide, by law, for the establishment of schools throughout the State, in such manner that the poor may be taught gratis."

### III.

THE FIRST AMENDMENT WAS NOT INTENDED TO ABOLISH RELIGION FROM GOVERNMENT OR FROM PUBLIC SCHOOLS.

By religion here we mean religion in a non-sectarian sense and without preference of one sect over another.

The First Amendment provides that Congress shall make no law—

“respecting an establishment of religion”

or

“prohibiting the free exercise thereof”

The amendment provides two separate and independent prohibitions. The individual shall have the right to believe in any form of religion or no religion at all. There is, however, no implication that Congress may not recognize religion generally.

What is prohibited is “*an* establishment of religion”, not *the* establishment of religion generally.

By *an* establishment of religion was meant a religion of a particular sect, such as the Episcopal or Congregational. At the time of the adoption of the Constitution, nine of the colonies had made either the Episcopal or Congregational Church their established church.

It was not the intention of the framers of the Constitution to destroy or abolish the foundation of religion which had already existed in all of the colonies, or to do this in order to satisfy the negative thinking of a few atheists. The purpose was to prohibit legislation in the interest of a particular sect.

A state statute making blasphemy a crime, we submit, is not invalidated by the First Amendment.

The instruction involved in *McCullum v. Board of Education*, 333 U. S. 203, was conducted by representatives of the Protestant, Catholic and Jewish churches. The teaching by each denomination was clearly sectarian and was intended to be so.

Religion was the most powerful moving force in the foundation of the American Colonies. This influence is most thoroughly documented in the case of Pennsylvania, but was strongly prevalent in the settlement of the other Colonies.

There has never been a time when religion was not recognized and invoked in the functions of the Federal government and tax monies have not been expended to support religion and religious education and other religious activities.

The first session of Congress, which enacted the resolution submitting the First Amendment to the people, also passed a law to engage and pay for the services of a Chaplain to offer prayers in Congress; and adopted a resolution to call upon the President to recommend to the people a day of public Thanksgiving and prayer to acknowledge "the many signal savers of Almighty God". From the foundation of the Federal government down to the present time, tax paid monies have been used by it to pay for Chaplains in the Army and Navy and in the academies at West Point and Annapolis and to pay for missionaries to spread religion among the Indians. Houses of religious worship have

been exempted from taxation by state governments generally.

These practices have been recognized by numerous authorities.

In *Holy Trinity Church v. United States*, 143 U. S. 457 (1892), it was held that an act prohibiting the importation of aliens under contract to perform labor, did not apply to a contract by which an alien minister agreed to immigrate to the United States and serve as minister of the church.

In the opinion Mr. Justice Brewer said:

“But beyond all these matters no purpose of action against religion can be imputed to any legislation, state or national, because *this is a religious people*. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation. \* \* \*

(465)

After quoting the language of many public documents which played an important part in the early history of this nation, Mr. Justice Brewer continued:

“There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; *they affirm and reaffirm that this is a religious nation*. These are not individual sayings, declarations of private persons; they are organic utterances; they speak the voice of the entire people. While because of a general recognition of this truth the question has seldom been presented to the courts, yet we find that in *Updegraph v. The Commonwealth*, 11 S. & R. 394, 400, it was decided



that, 'Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania; \* \* \* not Christianity with an established church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men.' \* \* \*"  
(470) (Emphasis added)

In *People v. Ruggles*, 8 Johns. (N.Y.) 290 (1811), the defendant argued that his conviction of blasphemy was a violation of the clause of the Constitution of New York guaranteeing the freedom of religion.

The Supreme Court of Judicature affirmed the conviction, and in its opinion, Chief Justice Kent, said:

\* \* \* \* \*

"Though the constitution has discarded religious establishments, it does not forbid judicial cognisance of those offences against religion and morality which have no reference to any such establishment, or to any particular form of government, but are punishable because they strike at the root of moral obligation, and weaken the security of the social ties. The object of the 38th article of the constitution, was, to 'guard against spiritual oppression and intolerance' by declaring that 'the free exercise and enjoyment of religious profession and worship, without discrimination or preference, should for ever thereafter be allowed within this state, to all mankind.' This declaration (noble and magnanimous as it is, when duly understood) never meant to withdraw religion in general, and with it the best sanctions of moral and social obligation, from all consideration and notice of the law. It will be fully satisfied by a free and universal toleration,

without any of the tests, disabilities, or discriminations, incident to a religious establishment. \* \* \* the framers of the constitution intended only to banish test oaths, disabilities and the burdens, and sometimes the oppressions, of church establishments; and to secure to the people of this state, freedom from coercion, and an equality of right, on the subject of religion. \* \* \* (296-297)

*Terrett v. Taylor*, 13 U. S. (9 Cr.) 43 (1815).

Section 16 of the Virginia Bill of Rights . . . , provided:

“That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity, towards each other.” (86)

Previously the Episcopal church had been the established church of the Colony of Virginia.

In 1776 the Legislature of Virginia enacted laws confirming the title of the Episcopal church to its lands and also making the minister and vestry a corporation by the name of the Protestant Episcopal church.

In 1798 the Legislature repealed these statutes and directed the overseers of the poor to sell the lands of the church and appropriate the proceeds to the use of the poor.

This court held this last statute to be in violation of the Virginia constitution. In its opinion, Mr. Justice Story said:

“\* \* \* Consistent with the constitution of Virginia, the legislature could not create or continue a religious establishment which should have exclusive rights and prerogatives, or compel the citizens to worship under a stipulated form or discipline, or to pay taxes to those whose creed they could not conscientiously believe. But the free exercise of religion cannot be justly deemed to be restrained, by aiding *with equal attention the votaries of every sect* to perform their own religious duties, or by establishing funds for the support of ministers, for public charities, for the endowment of churches, or for the sepulture of the dead. \* \* \*”  
(49) (Emphasis added)

Cooley's Constitutional Limitations (8th ed.)—  
Page 966:

“Those things which are not lawful under any of the American constitutions may be stated thus:—

“1. Any law respecting an establishment of religion. The legislatures have not been left at liberty to effect a union of Church and State, or to *establish preferences by law in favor of any one religious persuasion* or mode of worship. There is not complete religious liberty where any one sect is favored by the State and given an advantage by law over other sects. \* \* \*”

Pages 974, 975:

“But while thus careful to establish, protect, and defend religious freedom and equality, the

*American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in finite and dependent beings. Whatever may be the shares of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the great Governor of the Universe, and of acknowledging with thanksgiving His boundless favors, of bowing in contrition when visited with the penalties of His broken laws. No principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encouraged by a general exemption of the houses of religious worship from taxation for the support of State government. Undoubtedly the spirit of the constitution will require, in all these cases, that care be taken to avoid discrimination in favor of or against any one religious denomination or sect; but the same reasons of State policy which induce the government to aid institutions of charity and seminaries of instruction, will incline it also to foster religious worship and religious institutions, as conservators of the public morals, and valuable, if not indispensable assistants in the preservation of the public order." (Emphasis added)*



Story on the Constitution—

Section 1873:

"Now, there will probably be found few persons in this or any other Christian country who would deliberately contend that it was unreasonable or unjust to foster and encourage *the Christian religion generally*, as a matter of sound policy as well as of revealed truth. In fact, every American colony, from its foundation down to the revolution, with the exception of Rhode Island, if, indeed, that State be an exception, did openly, by the whole course of its laws and institutions, support and sustain in some form the Christian religion; and almost invariably gave a peculiar sanction to some of its fundamental doctrines. \* \* \*"

Section 1874:

"Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration, the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation."

Section 1876:

"*But the duty of supporting religion, and especially the Christian religion, is very different from the right to force the consciences of other men or to punish them for worshipping God in the manner*"

*which they believe their accountability to him requires. \* \* \**" (Emphasis added)

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1951

No. 9

DONALD R. DOREMUS and ANNA E. KLEIN,  
*Appellants,*  
*vs.*

BOARD OF EDUCATION OF THE BOROUGH OF  
HAWTHORNE and THE STATE OF NEW JERSEY,  
*Appellees.*

ON APPEAL FROM THE SUPREME COURT OF THE  
STATE OF NEW JERSEY

**BRIEF OF AMERICAN CIVIL LIBERTIES UNION  
AS AMICUS CURIAE**

AMERICAN CIVIL LIBERTIES UNION,  
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# Supreme Court of the United States

OCTOBER TERM, 1951

No. 9

DONALD R. DOREMUS and ANNA E. KLEIN,  
*Appellants,*

*vs.*

BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE and  
THE STATE OF NEW JERSEY,

*Appellees.*

ON APPEAL FROM THE SUPREME COURT OF THE  
STATE OF NEW JERSEY

## BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE

### Interest of American Civil Liberties Union

The American Civil Liberties Union is a non-profit, non-partisan, non-sectarian organization devoted to the protection and preservation of the fundamental freedoms guaranteed to all citizens of this country by federal and state constitutions. Its membership is nation-wide and includes persons of different religious views and sects.

It believes no human freedoms are more important than those guaranteed in the First Amendment and that of those none is more to be preferred or more worthy of protection than freedom of religion. It believes in the fundamental

American doctrine of complete separation of Church and State, because without it religious freedom for all is impossible. That principle of separation, it believes, must be steadfastly and clearly maintained in its broadest aspects. It regards the tax-supported, free, public school as one of the most democratic American civil institutions and believes that its ideal of secular instruction should not be thwarted by using it as an agency for the assertion of the claims of religion.

For many years it has opposed, consistently, Bible reading, prayers and other religious services, ceremonies and instruction in the public schools, as a violation of the principles of separation of church and state and religious freedom under the First and Fourteenth Amendments of the United States Constitution.<sup>1</sup>

The Union has intervened here because this case concerns that problem and is important.

This brief is filed with the consent of the parties.

### **Brief Statement of the Case**

This case involves the constitutionality of two New Jersey statutes (Rev. Stat. 18:14-77; Rev. Stat. 18:14-78).

R.S. 18:14-77 provides:

#### *Reading Bible at Opening of School.*

At least five verses taken from that portion of the Holy Bible known as the Old Testament shall be read, or caused to be read, without comment, in each public school classroom, in the presence of the

<sup>1</sup> In its *amicus curiae* brief in *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203, it anticipated the issues in the present case and cited state statutes and authorities relating thereto (see pp. 33-38 and Appendix of that brief); Stokes, "Church and State in the United States", Vol. II, p. 552.

pupils therein assembled, by the teacher in charge, at the opening of school upon every school day, unless there is a general assemblage of the classes at the opening of the school on any school day, in which event the reading shall be done, or caused to be done, by the principal or teacher in charge of the assemblage and in the presence of the classes so assembled."

R.S. 18:14-78 provides:

*"Religious Services or Exercises.*

No religious service or exercise, except the reading of the Bible and the repeating of the Lord's prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools."

Appellants are citizens and taxpayers, one being the parent of a child in a local public school (R. 1).

It is admitted that the appellee Board of Education, in compliance with such statutes, has engaged and is engaging in the practices, daily, of reading excerpts from that portion of the Holy Bible known as the Old Testament, without comment, and of having the Lord's Prayer recited in the classrooms and assembly halls in the public schools of the Borough of Hawthorne; also that these schools are supported by public tax, school funds obtained from the school district and from the State (R. 1-3, 5-6). It is stipulated that the Board has issued a directive providing that "any student may be excused during the reading of the Bible upon request" (R. 5).

We believe, as appellants assert, that these statutes and the practices thereunder constitute a violation of the First and Fourteenth Amendments of the United States Constitution.

## POINT I

**The New Jersey Statutes and the practices of the appellee Board of Education are not within the competence of the State and are in conflict with the First and Fourteenth Amendments of the United States Constitution.**

From the very headings and texts of the statutes, it is perfectly plain that the practices involved are, and were understood by the Legislature to be, *religious services and exercises*.

Under these statutes there is no maximum limit to the number of verses which may be read. There is no requirement that they be from the King James version (Protestant) or from the Douay version (Roman Catholic) of the Bible or from the Hebrew Scriptures. There is no direction given for their selection. Presumably, the selection lies in the discretion of the individual school teachers or principals. It would be in accordance with the statute, in townships where Protestants are dominant, if the verses be selected from the King James version and the King James version of the Lord's Prayer be used, to the violation of constitutional rights of Catholics. It also would be in accordance with the statute, in townships where Roman Catholics are dominant, that their form of the Lord's Prayer be used and that the selections be taken from the Douay version, including, for example, readings from Maccabees I and II on the subject of purgatory, which Books are not in the King James version, to the violation of constitutional rights of Protestants. Whichever version of the Lord's Prayer is selected for public recitation, constitutional rights of Jewish children are impaired.



It is doubtful if the religious services or exercises demanded by the statute can be performed in less than twelve minutes a day or one hour a week. Several hours a week probably are necessitated. The time of public school teachers or principals must be used to conduct such religious services and exercises and in the selection of the verses to be read. The rooms and facilities of the public school buildings are used for such religious purposes. The time of pupils, required under the State's compulsory education law to attend school for secular education, is used for religious purposes. The statutes themselves permit no freedom from their compulsions, but even if they did that would not cure their constitutional infirmity.

The decision below of the Supreme Court of New Jersey (R. 22-38) sustains the statutes as not violating the First and Fourteenth Amendments on the theory that there is an "almost universal belief in God" (R. 33), that the Declaration of Independence "frankly grounded its position in the unalienable rights endowed by God" (R. 26), that "theism is the warp and woof of the social and the governmental fabric" (R. 34), that "The American people are and always have been theistic" (R. 35), that the purpose of the New Jersey statutes is "that belief in God shall abide" (R. 36), and that governmental "recognition" and "acknowledgment" of God as God must not be "suppressed" (R. 25, 37).

The proposition is thus advanced that the God of Nature invoked in the Declaration of Independence is, in effect, our government Deity. The conclusion is that children in the public schools should be compelled to worship the Jehovah of the Old Testament. Are they the same? Implicit in the failure to provide for readings from the New Testament is the conclusion that the Christian teachings in those

Scriptures and of God as portrayed therein, would be in conflict with the religious principles of some pupils.

The proposition is also advanced, in the decision below, that the Old Testament, because of its wide acceptance among Catholics, Protestants and Jews as Holy Writ, is not sectarian and, therefore, civil compulsion of any verses selected is justified, provided it is without comment. Also, this is said to be justified because all other religious groups are numerically small and have a negligible impact on our national life (R. 33).

A consideration of the history of the Church-State idea in Europe and in the American Colonies and of the reasons for separation of Church and State in the foundation of our government<sup>2</sup> should, we believe, determine the unsoundness of these fundamental propositions inherent in the statute and expressed in the decision below.

The Fourteenth Amendment has made applicable to the States the guarantees of the First, including the freedoms of religion, which have a preferred position. The States and all their agencies are [as incompetent as Congress to enact laws or give sanction to acts legislative in character which are in conflict with the prohibitions of the First Amendment. They cannot, through school policy, invade these rights secured to every citizen (*Schneider v. State*, 308 U. S. 147, 160 (1939); *Cantwell v. Connecticut*, 310 U. S. 296, 303 (1940); *Jamison v. Texas*, 318 U. S. 413 (1943); *Murdock v. Pennsylvania*, 319 U. S. 105, 108, 115 (1943); *Douglas v. Jeannette*, 319 U. S. 157, 162 (1943); *Martin v. Struthers*, 319 U. S. 141, 143, 151-2 (1943); *Prince v. Massachusetts*, 321 U. S. 158, 164 (1944); and *Thomas v. Collins*, 323 U. S. 516, 530 (1945)).

A State "shall make no law respecting an establishment

<sup>2</sup> Outlined by this Court in *Everson v. Board of Education*, 330 U. S. 1 (1947); *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203 (1948) and *Reynolds v. United States*, 98 U. S. 145 (1878).

of religion, or prohibiting the free exercise thereof" (*Everson v. Board of Education*, 330 U. S. 1, 8 (1947); *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203, 210 (1948)). As stated in those cases, the "establishment of religion" clause of the First Amendment means at least this:

"Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" 333 U. S. 203, 210-11; 330 U. S. 1, 15-16.

In the *Everson* case, *supra* (at pp. 11, 15-16, 18, 26-27, 31-33, 53), each of the separate opinions traced the historical background which preceded and precipitated the adoption of the First Amendment and all were agreed, from its generating history, that the purpose and effect of the Amendment was to create a complete and permanent separation of the spheres of religious activity and civil authority by forbidding every form of public or state aid or support for religion, in any guise, form or degree; and

that the Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers and to keep temporal institutions free from religious interference. (Cf. *McCullum* case, at p. 211.)

To us it seems very plain that the New Jersey law and practices aid one or more, if not all, religions and prefer one or some religions over others; that taxes are being levied and used there to support religious activities and the teaching and practicing of religion; and that, to the extent that church services are being conducted in the public schools (i.e., by Bible readings and recitation of the Lord's Prayer which are an important parts of services in most Protestant churches), the state is forcing or influencing children to go to them.

The constitutional inhibition of legislation on the subject of religion forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. It safeguards freedom of conscience and worship and free exercise of the chosen form of religion (*Cantwell v. Connecticut, supra*, at p. 303; *U. S. v. Ballard*, 322 U. S. 78, 86 (1943)).

That aspect of the First Amendment which forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship is absolute. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. *Man's relation to his God was made no concern of the state.* (*U. S. v. Ballard, supra*, at pp. 86-7).

Centuries of strife over the erection of particular dogmas as exclusive or all-comprehending faiths led to the inclusion of a guarantee of religious freedom in the Bill of Rights, which was designed to guard against a repe-



tion of these bitter religious struggles, (*Minersville School District v. Gobitis*, 310 U. S. 586; 593 (1940); overruled on other grounds 319 U. S. 642 (1943)).

In *Board of Education v. Barnette*, 319 U. S. 624 (1943), a state law making it compulsory for children in the public schools to salute and pledge allegiance to the flag was held unconstitutional in its religious compulsion upon a certain sect that considered the flag a graven image and the compliance by their children with the flag salute a violation of the clause in the Decalogue against the worship of graven images. There was a strong dissent on the ground that the general subject matter—patriotism in the public schools—was within the competency of the state legislature and that its fortuitous effect on religious belief did not bring it in conflict with the First and Fourteenth Amendments.

In this case, the subject of the legislation is religious services and exercises in public schools. The compulsion is in respect of any and all selected verses of the Old Testament. The subject matter itself is not within the competency of the New Jersey legislature and the compulsions are not in any way limited to a particular sect, but are imposed upon all pupils of all denominations. The legislature refers to the Bible as the "Holy Bible". The imposition is necessarily without comment. There is no limit to the amount of the imposition and it is followed by compulsory prayer in which all the children ask forgiveness of their sins.

In *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203 (1948), with the permission of the board of education, religious teachers employed by private religious groups gave religious instruction in the public schools once a week. Pupils, on parental request, were excused from secular classes and required to attend

the religious classes, but other pupils were not released from their public duties. This Court held the state's compulsory education system and machinery assisted and aided in providing pupils for the program and classes of religious instruction, that the public school was utilized to aid religious groups to spread their faith, and that the system fell squarely under the ban of the First Amendment. It said the state could not utilize its public school system to aid any or all religious faiths or sects.

In this case, the imposition of religious compulsion is much more direct and extensive. It is every day in the schools and throughout the entire system, and there is no limit as to the extent to which it may go in different townships. An enormous power has been delegated to unmentioned persons to apply in different districts or townships their own uncontrolled discretion as to what verses of the Old Testament to select and from what books of the Old Testament (whether in the Apocrypha of the King James version or within the Holy Canon of the Douay version) and as to the amount of time consumed in the services. In the *McCullum* case, the time consumed in the use of the public school buildings and facilities was one-half or three-quarters of an hour a week. There is nothing in this statute which would prevent these religious exercises, ceremonies and prayers taking up five hours or more a week.

In *Illinois ex rel. McCullum v. Board of Education, supra* (at pp. 215-216), Mr. Justice Frankfurter, in a concurring opinion, pointed out the compelling reasons for sharply confining a state and its public schools to secular education and to "instruction other than religious", leaving to the individual's home and church, education in the faith of his choice.

The public schools of America, including those in New Jersey, are temporal institutions, set up and governed by

civil authority. The principle is implicit in all public school systems that they must be under public control and secular in education. *City of New Haven v. Town of Torrington*, 132 Conn. 194.

As stated in *Peo. ex rel. Ring v. Board of Education*, 245 Ill. 334, 349 (1910):

"The public school is supported by the taxes which each citizen, regardless of his religion or his lack of it, is compelled to pay. The school, like the government, is simply a civil institution. It is secular, and not religious, in its purposes. The truths of the Bible are the truths of religion, which do not come within the province of the public school. No one denies their importance. . . . This is done, not from any hostility to religion, but because it is no part of the duty of the State to teach religion,—to take the money of all and apply it to teaching the children of all the religion of a part, only."

As this Court said in the *Barnette* case, *supra*, at page 637 (cf. *Everson* case, *supra*, Jackson, J., at p. 24):

"Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party or faction."

The fusion or commingling of secular and religious activities by Government through its instrumentalities, especially its public schools, is to be avoided.

Historically and necessarily, the principle of separation of church and state was carried over into the field of education. It was early recognized that if education was to be religious, it must be carried on with religious groups and without the support of the state; and that in an educational system supported by the state education must be

secular. Separation in education was necessary to save the public schools from being rent by religious conflicts. Prohibition of furtherance by the state of religious instruction became a guiding principle, in fact and feeling, of the American people. This was not due to any decline in the religious beliefs of the people and the secular public school did not imply indifference to the basic role of religion in the life of the people. Separation is a requirement to abstain from fusing the functions of Government and of religion. (See *Illinois ex rel. McCollum v. Board of Education*, *supra*, 333 U. S. 203, 215-16, 231, Frankfurter, J.)

Manifestly, education in the public schools of New Jersey under the statute and practices in question is not simply secular. It is a mixture of secular and religious education.

One of the great drives presently and constantly in motion is to abridge, in the name of education, the complete division of religious and civil authority which our forefathers made, by introducing religious education and observances into the public schools. (*Everson case*, *supra*, pp. 44, 63, Rutledge, J.)

The State of New Jersey, by these statutes, officially recognizes that the Bible, and the Old Testament portion of it are Holy and that the reading of the Bible and the recitation of the Lord's Prayer in its public schools is a religious service or exercise. The highest courts of other States have recognized that Bible reading, with or without comment, is religious instruction, a religious act and worship. (See, for example, *Peo. ex rel. Ring v. Board of Education*, 245 Ill. 334; 92 N. E. (2) 251 (1910); *State ex rel. Weiss v. District Board*, 76 Wisc. 177, 194, 199; 44 N. W. 967 (1890); *State ex rel. Finger v. Weedman*, 55 So. Dak. 343; 226 N. W. 348; *Herold v. Parish Board*, 136 La. 1034; 68 So. 116 (1915); *State ex rel. Freeman v.*



*Scheer*, 65 Neb. 853, 871, 880 (1902).) That recitation of the Lord's Prayer in a school assembly is a religious act or exercise is obvious. The Lord's Prayer to "Our Father" is an act of worship. It is not a secular act or exercise.

While there is some conflict in the state judicial decisions as to whether Bible reading is sectarian instruction, it seems clear, from any objective point of view, that it must be so regarded, as held in the state cases above cited.

There are different versions of the Bible, such as the Douay (Catholic) version and the King James (Protestant) version and one of these must be used in such reading. To the Catholic the King James version is sectarian and to the Protestant the Douay version is sectarian. To Jews and other non-Christians, the Christian Bible, of whatever version, is sectarian, since it includes the New Testament. The Jews and other non-Christians do not recognize that the New Testament is the word of God or that Jesus Christ is divine. To Christians the New Testament contains the highest and latest revelation of God's word and it is a discrimination against Christians not to read the New Testament, just as it would be a discrimination against Jews and other non-Christians to read the New Testament.<sup>3</sup> So, too, the Lord's Prayer is a sectarian prayer to those who do not recognize Jesus Christ as their Lord.

The Supreme Court of New Jersey justifies the practices under the statutes on the ground that the Old Testament is accepted by three great religions, the Jewish, Roman

<sup>3</sup> In Louisiana and Illinois the courts have decided that the reading of the New Testament violates the religious liberty of the Jews. *Harold v. Parish Board*, *supra*, 136 La. 1034 (1915); *Pco. ex rel. Ring v. Board of Education*, *supra*, 245 Ill. 334.

Catholic and Protestant,<sup>4</sup> and that all other religious groups are, "numerically small and, in point of impact on our national life, negligible" (R. p. 33).

That approach lacks the perspective of time and history and ignores the fundamental principles of religious freedom underlying the First Amendment.

It sets up, in reality, a "multiple establishment", contrary to the principles of the First Amendment which was not directed merely against a "single establishment" (Cf. Butts, *American Tradition in Religion and Education* at pp. 196, 209-10). It overlooks that it has been among those three religious groups that such practices in the public schools have caused the most conflicts, as pointed out in Point II hereafter; also, that, at least, some large Protestant groups oppose such practices. (See Stokes, *Church and State in the United States*, Vol. II, p. 571; Johnson, *Church-State Relationships in the United States* (1934) at pp. 116-126.)

If that approach had prevailed when the Bill of Rights was adopted, there probably would have been no First Amendment or any guarantees of religious freedom for citizens of the United States because in the Colonies, just before and at the time of the Revolution, the dominant religious groups numerically and politically, as well as those which had the greatest impact on our national life, were the Congregationalists and Episcopalians, both of which had state established churches. At that time such religious groups as the Roman Catholics, Methodists, Lutherans, Quakers and Jews were numerically small and, up

<sup>4</sup> Actually, there are marked differences in the content and rendition of the Old Testament in the Hebrew, King James and Douay versions of it. (See Vol. 3 (1947), Encyclopaedia Britannica article on "Bible", at pp. 499 et seq.)

to then, had had a negligible impact on our national life.<sup>5</sup> That, of course, is not true today. In the meantime, the relative size and influence of the Congregational and Episcopal groups has greatly diminished. Also, in the meantime have developed large and influential religious groups which either had not been heard of or were not a factor in the Colonies. Today in this country there are at least 256 religious sects or denominations, including a number of non-Christian religious groups. Under the U. S. Constitution there is or should be no difference in the principles applicable to a small minority religious group and to a large dominant religious group. The First Amendment does not select any group or type of religion for preferred treatment (*U. S. v. Ballard, supra*, at p. 87).

In recent years this Court has repeatedly insisted that in this land of many races and creeds the freedoms of religion of the First Amendment are for the benefit of and available to all religious groups and not simply majority, orthodox, wealthy and conventional religious groups. (See *Murdock v. Pennsylvania, supra*, at pp. 111, 115; *Follett v. McCormick*, 321 U. S. 573, 576-7 (1944); *Prince v. Massachusetts, supra*, at pp. 175-6; *Cantwell v. Connecticut, supra*, at p. 310; *United States v. Ballard, supra*, at pp. 78, 86, 93; *Board of Education v. Barnette, supra*, at pp. 642, 645 and 653; *Martin v. Struthers, supra*, at pp. 149, 150; *Communications System v. Dodds*, 339 U. S. 382, 449, Black, J.)

No state or official can prescribe what shall be orthodox or standard in religion. "Religious minorities as well as religious majorities were to be equal in the eyes of the political state"; "So far as the state was concerned there

<sup>5</sup> Stokes, *Church and State in the United States*, Vol. I, p. 273; Sweet, *Religion in America* (1946), at pp. 271-282; Sweet, *Religion in Colonial America* (1942).

was to be neither orthodoxy nor heterodoxy"; "Religion is outside the sphere of political government" and no religion should receive the state's support (*Barnette case*, *supra*, at p. 642; and Frankfurter, J., at pp. 653-4).

In *Dennis v. United States*, 341 U. S. 494 (1951), at page 550, Mr. Justice Frankfurter stated:

"The history of civilization is in considerable measure the displacement of error which once held sway as official truths by beliefs which in turn have yielded to other truths. Therefore the liberty of man to search for truth ought not to be fettered, no matter what orthodoxies he may challenge."

As stated in *Peo. ex rel. Ring v. Board of Education*, 245 Ill. 334, 346, "All stand equal before the law; the Protestant, the Catholic, the Mohammedan, the Jew, the Mormon, the free-thinker, the atheist"; "the majority has no right to force its views upon the minority, however small"; and "it is precisely for the protection of the minority that constitutional limitations exist."

Within these recognized principles, it would be just as justifiable and consistent, for example, for the Mormons (Latter Day Saints), in areas where they dominate, to insist that the Book of Mormon, which they regard as inspired of God, be read in public schools; or for Christian Scientists to insist that Mary Baker Eddy's "Science and Health with Key to the Scriptures" which they regard as inspired, to be read; or for Swedenborgians (New Church) to insist upon the readings of writings of Emanuel Swedenborg, such as "Arcana Celestia" or "Heaven and Hell", which they regard as inspired; or for Spiritualists to insist upon the reading of some of the messages which they regard as inspired; or for followers of Eastern religions, of which there are many in this country, to insist upon the



the reading of the holy books of the East such as the Confucian classics, the Buddha Scriptures and the Koran.

As noted above, the New Jersey statutes do not provide for the excuse or withdrawal of any pupil in the public schools during the reading of the Holy Bible or the repeating of the Lord's Prayer. Rather, they require such exercises in each public school classroom or assembly in the presence of the pupils therein.

Though the local town Board of Education has issued a directive that a pupil, upon request, may be excused during the reading of the Bible, that directive represents a failure to comply with the statute and is merely effective within that particular locality. The directive does not appear, from the record, to cover the recitation of the Lord's Prayer. But even if the statutes themselves did provide for such withdrawal upon request, the constitutional defects of these practices would not be cured. See the following cases where this point was specifically discussed: *Per. ex rel. Ring v. Board of Education, supra*; *State ex rel. Weiss v. District Board, infra*; *Hetold v. Parish Board, infra*; *Knowlton v. Baumhover*, 182 Ia, 691; 166 N. W. 202 (1918); *Harfst v. Hoegen*, 349 Mo. 808; 163 S. W. (2) 609 (1941).<sup>6</sup>

As the Illinois Supreme Court stated in the *Ring* case, *supra*, at page 351:

"The exclusion of a pupil from this part of the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school which the law never contemplated. All this is because of his religious belief."

<sup>6</sup> See also able dissenting opinions in *Wilkerson, et al. v. City of*

As Mr. Justice Frankfurter pointed out in the *McCollum* case *supra*, at page 227:

"That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of limitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend."

Picture the actual scene of a child making a request to leave and then leaving the classroom or assembly hall just before the commencement of the religious exercises. This would require great personal courage and the chances are that the child would stay and participate in the exercises, even if they were in conflict with the religious beliefs of himself or his parents. As pointed out in the State cases cited above, the fact that a child is not required to attend religious classes is not the critical factor. The very fact that there is any reason for his exclusion is the thing that interferes with his religious freedom and shows that the exercises are sectarian.

The various cases which have arisen in the States on this subject of Bible reading and prayer in the public schools will be cited and reviewed by the parties in their briefs. Some of them are discussed hereinafter. Collections and discussions of these cases will be found in *Johnson "Church-State Relationships in the United States"* (1934 and 1950 Editions); *Stokes "Church and State in the United States"*, Vol. II, pages 549, *et seq.*; 141 A.L.R. 1145; 5 A.L.R. 66; *Butts, American Tradition in Religion and Education* (1950), at pp. 190-7.

We believe that the decisions and opinions of the state courts in which such practices have been disapproved contain the better reasoning and are consistent with

the true meaning of the First and Fourteenth Amendments, as defined by this Court in the *Everson and McCollum* cases, and with the other decisions of this Court referred to above. (See, *Peo. ex rel. Ring v. Board of Education*, 245 Ill. 334; 92 N. E. 251 (1910); 29 L.R.A. (N. S.) 442; *Herold v. Parish Board*, 136 La. 1034 (1915); 68 So. 116; 56 L.R.A. (N. S.) 1915 D 941; *State ex rel. Weiss v. District Board*, 76 Wisc. 177; 7 L.R.A. 330 (1890); 44 N. W. 967; *Board of Education v. Minor*, 23 Ohio St. 211 (1872); 13 Amer. Rep. 233; *State ex rel. Finger v. Weedman*, 55 So. Dak. 343; 226 N. W. 348 (1929); *State ex rel. Freeman v. Schewe*, 65 Nebr. 853; 91 N. W. 826; rehearing denied, 65 Neb. 876 (1902); Cf. *State ex rel. Dearle v. Frazier*, 102 Wash. 369 (1918); See, also, the dissenting opinions in *Wilkerson, et al. v. City of Rome, et al.*, 152 Ga. 762 (1921); *Kaplan v. Independent School Dist.*, 171 Minn. 142 (1927); *Pfeiffer v. Board of Education*, 118 Mich. 560 (1898).

The opinions in these cases contain a detailed discussion of the issues involved and answer fully and convincingly, it seems to us, the arguments advanced by the Court below in support of such practices. Probably the leading case on the subject is *People ex rel. Ring v. Board of Education, supra*.

It is not without significance here, we think, that in *Illinois ex rel. McCollum v. Board of Education*, 396 Ill. 14 (reversed in 333 U. S. 203), plaintiff relied primarily on the Illinois Supreme Court's earlier decision in *People ex rel. Ring v. Board of Education*.<sup>7</sup> In deciding against Mrs. McCollum, the Illinois Supreme Court sought to distinguish the *Ring* case on this ground:

<sup>7</sup> See Transcript of Record, *Illinois ex rel. McCollum v. Board of Education*, U. S. Sup. Ct. at pp. 77, 80-83, 271-2.

"It can readily be seen that the exercises as conducted there were part of the public school program carried on while the children participating were in attendance in the public school classes. The exercises complained of were actually worship services including the Lord's prayer, the singing of hymns, and the participation in the exercises were compulsory."

The exercises in question consisted of reading from the King James version of the Bible, repeating the King James version of the Lord's Prayer and the singing of hymns. In the *Ring* case the Court had held it was immaterial whether or not the pupils could be excused on request from such exercises (at p. 351).

In the case here, as in the *Ring* case, the exercises are conducted as part of the tax-supported public school program carried on while the children participating are in attendance in the public school classes, are compulsory by statute (herein with leave under a local directive to be excused upon request), are conducted by public school teachers or principals and in public school buildings and consist of Bible readings and reciting the Lord's prayer in concert and publicly. (In the *McCullum* case a pupil was not required to participate in the classes on religion.)

This case does not involve the reading or studying of the Bible as literature or history or incidental allusions to the Bible or religion in the course of secular studies, as to which we express no opinion. It involves its reading as the Word of God, in a religious service, ceremony or exercise conducted solemnly in a school assemblage. Being thus read as the Holy Word and without comment, no opportunity is afforded to anyone to explain or to

<sup>8</sup> (Cf. Jackson, J., *Illinois ex rel. McCullum v. Board of Education*, 333 U. S. 203, 232-6.)



interpret the meaning of the passages read or to discuss the history, source, background and context of such passages or the books of the Bible in which they occur. It is not possible to subject such readings to the intellectual process or to the tests of modern Biblical research or to permit any rationalization thereof in relation to other studies which the children may be pursuing in the public schools. Of course, if such comments were permitted, they too might offend the religious sensibilities of some pupils or their parents; but without such comments or discussion, the whole atmosphere in which the reading takes place is one of religious awe, exercise, worship and ceremony.

The question involved in this case is not whether the Bible (Old or New Testaments or both, in one or another version or translation) should be read or taught to or studied by children. That can be done freely and in accordance with one's particular faith in the homes and churches and in private and religious schools.

To suggest that the public schools should not be utilized for this purpose, is not a manifestation of any hostility whatever to the Bible, the Lord's Prayer or religion. (*Illinois ex rel. McCollum v. Board of Education, supra*, at pp. 211-2.) It is merely a recognition of the rights of all citizens to religious freedom.

Thereby, no child would be deprived of knowledge of the Old or New Testaments. Interestingly enough, it was only several centuries ago that the mere possession of the English translation of the Bible was a presumption of heresy.<sup>9</sup> Now, the Bible is in nearly every church, home, library, school, hotel, ship. In homes, churches and religious schools it is the subject of study, worship and exposition. It is not necessary or desirable that the

<sup>9</sup> Trevelyan, *English and Social History*, at p. 79.

State, through its public school system, personnel and facilities, should take over from the homes, churches and religious schools, such religious instruction and activities. It is best for religion and best for the State that that should not be done. (*Illinois ex rel. McCollum v. Board of Education*, *supra*, at p. 212 and at p. 232 Frankfurter J.; *Everson v. Board of Education*, 330 U. S. 1, 59 Rutledge, J.) Today it is estimated that one of every two Americans is a church member,<sup>10</sup> whereas in 1790 not more than one out of eight Americans belonged to any church.<sup>11</sup> Religion has flourished in this country under the principle of separation of church and state.

This Court has recognized that the provisions of the First Amendment, in the drafting of which Madison, directly, and Jefferson, indirectly, played such leading roles, have the same objectives and were intended to provide the same protection against governmental intrusion on religious liberty as Jefferson's Virginia "Bill for Establishing Religious Freedom" and Madison's "Memorial and Remonstrance" (see *Reynolds v. U. S.*, 98 U. S. 145, 163-4 (1878); *Everson v. Board of Education*, 333 U. S. 1, 13 (1948)).

We do not believe that the New Jersey statutes and practices involved herein and the decision below are consistent with the statements in those great documents of religious freedom. For instance, Madison in his "Memorial and Remonstrance"<sup>12</sup> maintained that "in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance"; and that "the same authority which can establish Christianity, in exclusion of all other Religions;

<sup>10</sup> Stokes, *Church and State in the United States*, Vol. I, pp. 229-30.

<sup>11</sup> Year-book of American Churches (1951 Ed.), p. 239.

<sup>12</sup> Quoted in full as an appendix to *Everson v. Board of Education*, 330 U. S. 1, 68-72.

may establish with the same ease any particular sect of Christians, in exclusion of all other sects'. Jefferson in the "Virginia Bill"<sup>13</sup> asserted that "No man shall be compelled to frequent or support any religious worship, place or ministry whatsoever"; and "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical"; and "our civil rights have no dependence on our religious opinions".

When the Court below suggests (R. 35) that no Jewish parent should object to having his child repeat the Lord's Prayer, for Christ was a Jew speaking to Jews, the question arises as to whether the civil magistrate is, not intruding his powers into the field of opinion, in the words of the "Virginia Bill". And when the Court below, in effect, establishes by judicial decree that "theism" is the national religion, and that minor religious groups (those other than the Jewish, Roman Catholic and Protestant) are not entitled to the equal standing because their tenets "had no vital part in the formation of our national character", one wonders at the prophetic wisdom of Madison's suggestion that the same authority which can establish Christianity can easily establish a particular sect of Christians (Cf. *Deuteronomy* 13:1-9). It is not necessary for us to expatiate on these matters which are so familiar to this Court. We think they have application here.

We believe that the religious practices in question are outside of the competence of the State of New Jersey and its local boards of education and represent a direct violation of the First Amendment as applied to the States through the Fourteenth and are inconsistent with the decisions of this Court as to the meaning of the First Amendment.

<sup>13</sup> *Everson v. Board of Education*, *supra*, at pp. 12-13; Henning, Stat. of Virginia (1823) 84.

## POINT II

The attempts to force Bible reading and prayers into the public schools have created in the States many years of bitter divisions and strife. The cases illustrate the need and reason for a strict separation of State and religion in the area of the public schools.

The number of cases that have arisen in the States over the issue of Bible reading and prayer in the public schools indicate the strife and divisiveness that such practices cause. Most of these cases have been brought by Catholics, some by Jews, each representing a local minority religious group. Some dominant Protestant groups, in encouraging these practices,<sup>14</sup> have seemingly failed to appreciate the position of minority Protestant sects, Catholics, Jews and other non-Christians and non-believers, all of whom are required to pay taxes and children of whom attend the public schools. Their attitude might well be different if, by reason of a shift of population, such religious exercises and instruction in local public schools were to consist of prayers and readings characteristic of the Catholic or Jewish faiths or of other religious groups.<sup>15</sup>

We shall refer to a few of these cases which illustrate the point and indicate why it is of vital importance, in the protection of the religious liberty of all persons, that the principle of separation of Church and State be applied and maintained, strictly, in the field of free, tax-supported public school education.

In *Donahue v. Richards*, 38 Me. 376 (1854), defendant school committee directed the English Protestant version

<sup>14</sup> See Butts, *The American Tradition in Religion and Education* (1950) p. 196.

<sup>15</sup> Cf. *State ex rel. Dearle v. Frazier*, 102 Wash. 369, 383-4 (1918).



of the Bible to be read in public schools and that all scholars should be required to read that version. Plaintiff's daughter, fifteen, a Roman Catholic, on direction of her father refused from conscientious religious scruples to read the Protestant version. She and her father regarded such reading as sinful. Defendant directed her to leave school. The parent employed a teacher at his own expense and sued for damages. The court held the father had received no pecuniary injury and the loss of being deprived of education fell upon the daughter. The court, thereafter, non-suited the daughter (38 Me. 379) and upheld the required reading of the Bible in public schools.

In *Spiller v. Inhabitants of Woburn*, 94 Mass. 127 (1866), a pupil sued to recover damages for being expelled from grammar school. The school committee had ordered school to be opened each morning with reading from the Bible and with prayer, and that during prayer scholars should bow heads. By a later modified order any pupil could be excused from bowing the head where the parent requested it. Plaintiff's father refused to request it and plaintiff was excluded from the school. The court, nonsuiting plaintiff and approving the practices, held the modified order did not compel the pupil to join in the prayer.

In *Peo. ex rel. Ring v. Board of Education*, 255 Ill. 334 (1910), parents of children, Roman Catholics, sought mandamus to prevent the reading of the King James version of the Bible and the repetition of the Lord's Prayer, as found therein, in the public schools. They alleged that their Church believes that the King James version is incorrect and incomplete, and disapproves of its being read as a devotional exercise, and that such rule violated their rights under the State and Federal constitutions.

In one of the most carefully written and learned opinions on the subject the court (at p. 338) held the exercises

constituted "*worship*"; that "They are the ordinary forms of worship usually practiced by Protestant Christian denominations"; and "One does not enjoy the free exercise of religious worship who is compelled to join in any form of religious worship." The court (at pp. 339-40) said: "*Prayer is always worship*," and the wrong consisted of the compulsion to join in a form of worship; "The free enjoyment of religious worship includes freedom not to worship." The court, quoting Madison, held that "'religion, or the duty we owe to the Creator' is not within the cognizance of civil government." It stated (at p. 341) that most of the governments of the world have claimed and have exercised the right to interfere with and direct the religious profession and worship of their citizens, and that a government without a state religion was hardly known before the adoption of the Federal constitution. The court, in describing the Bible, stated (at p. 343):

"The historical and literary features of the Bible are of the greatest value, but its distinctive feature is its claim to teach a system of religion revealed by direct inspiration from God. It bases its demand for the reverence and allegiance of mankind upon the direct authority of God himself."

The court (at p. 344) said that each party—Protestant and Catholic—claimed its own version is the most accurate presentation of the inspired word; that the Catholics claim there are cases of willful perversion of the Scriptures in the King James translation from which erroneous doctrines and inferences may be drawn; that the Lord's Prayer is differently translated in the two versions and it has been claimed that the Lord's Prayer has been tampered with and a discord thrown into daily devotions; that the Catholic version contains six whole books and portions of other

books not included in the King James version and the Protestant churches do not recognize them as a part of the Scriptures. The court remarked (at p. 345) that neither party would accept the Bible of the other as representing the inspired word of God; that differences of religious doctrine may seem immaterial to some but to others are vitally important; that "Sectarian aversions, bitter animosities and religious persecutions have had their origin in apparently slender distinctions."

The Bible, it said (at pp. 346-8), is a sectarian book.

The court (at p. 346) said the reading of the Bible in school constituted religious instruction, that if the Bible is to be read in school at all, it must be read "*as the living word of God*", that its words are entitled to be received "*as authoritative and final*."

The court then (at p. 347) said in respect of the Catholic petitioners:

"Why should the State compel them to unlearn the Lord's Prayer as taught in their homes and by their church and use the Lord's Prayer as taught by another sect?"

The court (at p. 347) said that the Christian believes "that Judaism was a temporary dispensation, and that Christ was the Messiah,—the Saviour of the world;" while the Jew denies Christ was the Messiah.

At page 348 the court pointed out that no test could be laid down in respect of selecting portions of the Bible for reading and that "the only means of preventing sectarian instruction in the schools is to exclude altogether religious instruction, by means of the reading of the Bible or otherwise" and added:

"The Bible is not read in the public schools as mere literature or mere history. It cannot be separated from its character as an inspired book of religion."

To leave the selection to a teacher, whether irreligious, Protestant, Catholic or Jew, would be a good way of permitting all to be read. The court (at p. 349) said that the State of Illinois was a Christian state and that no doubt it was a Protestant state, but that the state could not, under the constitution, be a teacher of religion, that *the truths of the Bible are the truths of religion which do not come within the province of the public school.*

The court further held that exclusion of a pupil from the religious instruction or exercise did not cure the situation but caused discrimination and divisiveness and proved the instruction or exercise was sectarian and forbidden by the constitution (at p. 351).

In *Knowlton v. Baumhover*, 182 Iowa 691 (1918), the only public school of a certain district where the inhabitants were prevailingly Roman Catholic was held in a parochial school building, and in a number of different respects was merged in the parochial school. The court enjoined such activities. At page 704 it said:

"If there is any one thing which is well settled in the policies and purposes of the American people as a whole, it is the fixed and unalterable determination that there shall be an absolute and unequivocal separation of church and state; and that our public school system, supported by the taxation of the property of all alike—Catholic, Protestant, Jew, Gentile, believer and infidel—shall not be used, directly or indirectly, for religious instruction."

It further said:

"There is no such thing as a universally accepted religion, and differences of opinion and thought along these lines have developed an almost numberless variety of churches, societies, and other voluntary organizations, each dedicated to the promotion



of the peculiar views of its adherents. We speak of these diverse bodies as sects; and, while the word 'sectarian' is sometimes used as a term of reproach, there is a very just and inoffensive sense in which it may be said that every religionist is a sectarian; for, believing that he is right, and that his conception of the true relation between man and God is correct, he is conscientiously impelled to promote that faith by precept, example, and leadership." (at p. 704)

. . . . .

"At the bar of the court, every church or other organization upholding or promoting any form of religious faith or practice is a sect, and to each and all alike is denied the right to use the public schools or the public funds for the advancement of religious or sectarian teaching." (at p. 706)

At page 720 it noticed the fact that in many instances the courts had excluded Bible reading from the schools because of suits brought by Roman Catholics and upon the theory that the law has excluded from our public schools all religious and sectarian teaching and training, Protestant and Catholic alike; and that the Catholics, having barred Protestant religions from the schools, could not complain if they were subjected to the operation of the same rule. At page 722 it stated that the controversy in regard to religious education was not to be decided by the number of adherents on either side, and added "*The law and one are a majority, and must be allowed to prevail.*"

To the same effect see *Harfst v. Hoegen*, 349 Mo. 808 (1942).

◊ In *Board of Education v. Minor*, 23 Ohio State Reports 211 (1872), the Board of Education of Cincinnati adopted two resolutions concluding to discontinue religious instruction, including the Holy Bible, in the common schools. Taxpayers brought suit to enjoin the Board from giving up such religious instruction. Defendants in their answer

claimed that there were a number of Israelites and Roman Catholics that could properly object to such religious instruction and there were also a large number of persons in the community ready and qualified to act as public school teachers who object to Bible reading on conscientious grounds and are thereby precluded from employment as teachers. The Board of Education concluded that it was neither right nor expedient to continue in use in public schools the reading of any version of the Bible as religious exercise. The court said:

"The same word 'religion', and in much the same connection, is found in the constitution of the United States. The latter constitution, at least, if not our own also, in a sense, speaks to *mankind*, and speaks of the rights of *man*. Neither the word 'Christianity,' 'Christian,' nor 'Bible,' is to be found in either. When they speak of 'religion,' they must mean the religion of man, and not the religion of any *class* of men. When they speak of 'all men' having certain rights, they can not mean merely 'all Christian men.' Some of the very men who helped to frame these constitutions were themselves not Christian men.

We are told that this word 'religion' must mean 'Christian religion,' because 'Christianity is a part of the common law of this country,' lying behind and above its constitutions. Those who make this assertion can hardly be serious, and intend the real import of their language. If Christianity is a *law* of the state, like every other law, it must have a *sanction*. Adequate penalties must be provided to enforce obedience to all its requirements and precepts. No one seriously contends for any such doctrine in this country, or, I might almost say, in this age of the world." (at pp. 246-7)

. . . . .

“*Legal Christianity* is a solecism, a contradiction of terms. When Christianity asks the aid of government beyond mere *impartial protection*, it denies itself. Its laws are divine, and not human. Its essential interests lie beyond the reach and range of human governments. United with government, religion never rises above the merest superstition; united with religion, government never rises above the merest despotism; and all history shows us that the more widely and completely they are separated, the better it is for both.” (at p. 248)

\* \* \* \* \*

“The state can have no religious opinions; and if it undertakes to enforce the teaching of such opinions, they must be the opinions of some natural person, or class of persons. If it embarks in this business, whose opinion shall it adopt? If it adopts the opinions of more than one man, or one class of men, to what extent may it group together conflicting opinions? or may it group together the opinions of all? And where this conflict exists, how thorough will the teaching be? Will it be exhaustive and exact, as it is in elementary literature and in the sciences usually taught to children? and, if not, which of the doctrines or truths claimed by each will be blurred over, and which taught in preference to those in conflict? These are difficulties which we do not have to encounter when teaching the ordinary branches of learning. It is only when we come to teach what lies ‘beyond the scope of sense and reason’—what from its very nature can only be the object of *faith*—that we encounter these difficulties. Especially is this so when our pupils are children to whom we are compelled to assume a dogmatical method and manner, and whose *faith* at last is more a *faith* in us than in anything else.” (at p. 249)

In regard to the argument that the state should undertake to teach Christianity in such a broad sense as to be

in harmony with the different sects, the court (at p. 250) said that such law would be an *unchristian* law and that it would constitute "a state religion in embryo." It said (at p. 250) that in carrying out the bill of rights of the state it could summarize the matter in two words, by calling it the doctrine of "hands off." It said the true republican doctrine in regard to religion was simply and easily understood, to wit:

"It means a free conflict of opinions as to things divine; and it means masterly inactivity on the part of the state, except for the purpose of keeping the conflict free, and preventing the violation of private rights or of the public peace. Meantime the state will impartially aid all parties in their struggles after religious truth, by providing means for the increase of general knowledge, which is the handmaid of good government, as well as of true religion and morality." (at p. 251)

After pointing out that the constitutional guarantees are for the purpose of protecting the weak against the strong and the few against the many, the court concluding, stated:

"Government is an organization for particular purposes. It is not almighty, and we are not to look to it for everything. The great bulk of human affairs and human interests is left by any free government to individual enterprise and individual action. Religion is eminently one of these interests, lying outside the true and legitimate province of government." (at p. 253)

\* \* \* \* \*

"Madison, who had more to do with framing the constitution of the United States than any other man, and whose purity of life and orthodoxy of religious belief no one questions, himself says:

'Religion is not within the purview of human government.' And again he says: 'Religion is



essentially distinct from human government, and exempt from its cognizance. A connection between them is injurious to both. There are causes in the human breast which insure the perpetuity of religion without the aid of law.' " (pp. 233-4)

In *Clithero v. Showalter*, 159 Wash. 519 (1930), petitioners by mandamus sought to compel religious instruction in the public schools, claiming that the Bible should be read each and every day in the public schools and that the reading and the teaching of the Holy Scriptures should be made compulsory. The court denied the writ on the ground that the constitution of the State of Washington was "held to forbid everything that is here demanded." This Court in *Clithero v. Showalter*, 284 U. S. 573, dismissed the appeal "for want of a substantial federal question."

In *State ex rel. Finger v. Weedman, et al.*, 226 N. W. 348; 55 So. Dak. 343 (1929), defendants had ordered the Bible to be read or the Lord's Prayer repeated without sectarian comment in all school rooms of the public school. The King James version of the Bible was selected and the Lord's Prayer was repeated daily. Twelve or fifteen Roman Catholic children refused to attend the opening exercises, were expelled and not allowed to return unless they signed a written apology. Action was brought by the father of one of the children to compel readmission without apology and thereafter to permit the child to be absent during the Bible reading. The court on appeal granted the relief asked. The court noted the variations in the decisions in respect of Bible reading and attributed the differences to the personal beliefs and prejudices of the judges. The court (at p. 349) said that to use the Bible as a mere code of morals or as a book of history would be to affront all Christian sects; that it is hardly adaptable for use in

secular instruction without comment and analysis. The court (at p. 349) said:

"The legitimate function of our public schools is to impart secular knowledge, and there can be no proper limitation on the comment necessary to impart such knowledge, if the subject is to be taught at all."

The court (at p. 350) said:

"The persecution of our forefathers was merely one organization fighting another organization, and none of them fighting the living principles of the Bible, one trying to force on another its construction of the Bible and mode of worship. *The primary object of the Constitutions was to prevent that form of persecution. No other form was threatened or feared.*"

The court then noted the difference in the books of the Bible and in the translation of the Bible and that the Protestants accept all versions except the Douay versions; that their objection to that version is that it sanctions some of the dogmas and practices of the Catholic church denounced by Protestants; that if their aversion is well founded, that alone is sufficient evidence of a substantial difference; that the Douay version contains six books not found in the Protestant translations; that among those are the First and Second Maccabees, containing passages from which the Catholics obtain their belief in purgatory, a doctrine not accepted by the Protestants; that in the King James version the Lord's Prayer contains a sentence "Give us this day our daily bread", whereas the Douay version says "Give us this day supersubstantial bread"; that these differences give rise to bitter doctrinal controversies; that the King James version is bitterly opposed to the Catholics; that in the dedication of a church, the

Pope is referred to as "that man of sin". The court at page 351 said that, neither Judges nor teachers of the public schools could say which side is right and which side is wrong, and that considering the bitter dissensions between organizations over conflicting theories, religious freedom requires that education in that subject rest exclusively in the churches and in individuals; that *the state as educator must leave the teaching of religion to the church "because the church is the only body equipped to so teach."* The court (at p. 352) said that *if the state teaches religion*, many parents will, because of their religious belief, *keep their children from the public schools* and thereby be deprived of all public school privileges. The court (at p. 354) said:

*"The state as an educator must keep out of this field, and especially is this true in the common schools, where the child is immature, without fixed religious convictions, and the parents' liberty of conscience is the controlling factor, and not that of the pupil."*

In *State ex rel. Weiss v. District Board*, 76 Wis. 177 (1890), relators, Roman Catholics and parents of children attending public school, attempted to enjoin the reading of the King James version of the Bible in the public school, alleging that such version was incorrect and incomplete by reason of the omission of books held by the Roman Catholic Church to be integral portions of the inspired canon. They alleged that the Roman Catholic Church has divine authority as the only infallible teacher and interpreter of the Bible, and that the reading of the Bible without note or comment and without being expounded by the only authorized interpreters of same is not only not beneficial to the children but likely to lead to the adoption of dangerous errors. The defendants set up the particular portions of the Bible that

were being read and claimed that such portions did not contain sectarian matters. (Most of the portions of the Bible selected were of the New Testament. The only portions of the Old Testament included were parts of Psalms and of Proverbs.) The court stated that the religious world is divided into numerous sects maintaining different and conflicting doctrines; that some believe "in the literal truth of the scriptures, while others believe them to be allegorical teaching spiritual truths alone or chiefly" and that a great majority, if not all, of the sects base their peculiar doctrines upon various passages of the scriptures which may be reasonably understood as supporting the same. The case was determined under the constitution of Wisconsin, which prohibited sectarian instruction. The court determined that reading from the Bible in the schools without comment on the part of the teacher was sectarian instruction and "worship" and made the school a "place of worship". It was claimed that no rights were infringed if the children were not compelled to remain in the school room while the Bible was being read. The court (at pp. 199-200) said:

"We cannot give our sanction to this position. When, as in this case, a small minority of the pupils in the public school is excluded, for any cause, from a stated school exercise, particularly when such cause is apparent hostility to the Bible, which a majority of the pupils have been taught to revere, from that moment the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion, and subjected to reproach and insult. But it is a sufficient refutation of the argument that the practice in question tends to destroy the equality of the pupils which the constitution seeks to establish and protect, and puts a portion of them to serious disadvantage in many ways with respect to the others."



One of the concurring opinions stated (at pp. 220-1):

"All sects and denominations may teach the people their own doctrines in all proper places. Our constitution protects all, and favors none. But they must keep out of the common schools and civil affairs. It requires but little argument to prove that the Protestant version of the Bible, or any other version of the Bible, is the source of religious strife and opposition, and opposed to the religious belief of many of our people. It is a *sectarian* book. The Protestants were a very small sect in religion at one time, and they are a sect yet, to the great Catholic Church, against whose usages they protested, and so is their version of the Bible sectarian, as against the Catholic version of it.

"The common school is one of the most indispensable, useful, and valuable civil institutions this state has. It is democratic, and free to all alike, in perfect equality, where all the children of our people stand on a common platform and may enjoy the benefits of an equal and common education. An enemy to our common schools is an enemy to our state government. It is the same hostility that would cause any religious denomination that had acquired the ascendancy over all others, to remodel our constitution and change our government and all of its institutions so as to make them favorable only to itself, and exclude all others from their benefits and protection. In such an event, religious and sectarian instruction will be given in all schools. Religion needs no support from the state. It is stronger and much purer without it."

In *State ex rel. Dearle v. Frazier*, 102 Wash. 369 (1918), the question considered was whether the giving of credits for Bible study done outside of school violated the constitution of Washington providing that no public moneys should be applied to any religious worship, exercise or

instruction. In holding that such acts were unconstitutional, the court went into some of the controversies in regard to the Bible, the books involved and whether portions of it could be considered independent of religious characteristics. In this connection it said (at p. 378):

"Then, too, all citizens are not agreed as to the narrative and historical worth of the Bible. It is true that some of the events there recorded have shaped the destinies of millions of people, yet they are not mentioned in profane contemporaneous history. Some are not agreed whether many of the events there narrated are historical or allegorical; whether the earth was created in six days; where Cain obtained his wife; whether the whole earth was covered with a flood of waters; whether Jonah was swallowed by a whale; whether Elijah was translated by a whirlwind into heaven; whether Lot's wife was turned into a pillar of salt; whether our God stopped the sun in its course that Joshua might overcome his enemies; whether he made the waters of the sea to recede that his chosen people might pass to the promised land; whether God spake with the prophets, or ordered the lives of such great rulers as David and Solomon; are questions all sounding in narrative and history that have excited differences and controversies that are never settled.

That Bible history, narrative, and biography cannot be taught without leading to opinion, and oft-times partisan opinion, is understood and anticipated by the school board. They admit, as plainly as language can admit, that Bible teaching does lead to sectarian opinion and differences of opinion upon religious questions."

The concurring opinion said (at p. 386) it was plain "the curricula of the public educational institutions cannot be made to include any kind of religious worship, exercise, or instruction."

In *Herold, et al. v. Parish Board*, 136 La. 1034 (1915), two of the petitioners were Jews, the third a Catholic. They complained of a resolution of the Board of School Directors which recited that the children in their public schools were at the most impressionable age for receiving and retaining good or evil and that the lessons and truths contained in the Holy Bible are acknowledged "by all right-thinking people" as being of paramount value; that therefore the principals and teachers were requested to open daily sessions in the public schools with readings from the Bible, without note or comment, and, when the leader is willing to do so, that the Lord's Prayer be offered. The court, in enjoining enforcement of the resolution, said that the lessons and truths contained in the Holy Bible to be taught by reading to the children

"are read and taught as teachings from the inspired Word of God Himself. To read the Bible for the purposes stated requires that it be read reverently and worshipfully. *As God is the author of the Book, He is necessarily worshipped in the reading of it.* And the reading of it forms part of all religious services in the Christian and Jewish churches, which use the word. *It is as much a part of the religious worship of the churches of the land as is the offering of prayer to God.*" (at p. 1048)

The court stated that the reading of the Bible is religious instruction, not adapted for use as a text book; that such use would be inconsistent with its true character and that to permit the teacher to select the part of the Bible to be read without test determining the selection "is to allow any part, or all parts, to be selected"; to excuse the children on religious grounds from the reading

"would be a distinct preference in favor of the religious beliefs of the majority, and would work

a discrimination against those who were excused."  
(at p. 1050)

and that *equality in public education would be destroyed under a constitution which seeks to establish equality and freedom in religious matters.*

The court held that the practices would discriminate against children of Jews.

In *State ex rel. Freeman v. Scheve*, 65 Neb. 853 (1902), a teacher employed in the public schools obtained leave of the school board to have religious exercises in her school. She prayed, read the Bible to the pupils and with the pupils sang gospel hymns. One of the parents objected. The court enjoined the practice, holding (at p. 871), that the exercises constituted religious worship and were sectarian in character. The court stressed the importance of keeping dissension out of the public school system (at p. 872), saying:

"Unless opinions of universal acceptance in this country since the foundation of our government are at fault, it is a policy of the highest importance that the public schools should be the principal instruments and sources of popular education, because they exert, more than any other institution, an influence promotive of homogeneity among a citizenship drawn from all quarters of the globe. But if the system of compulsory education is persevered in, and religious worship or sectarian instruction in the public schools is at the same time permitted, parents will be compelled to expose their children to what they deem spiritual contamination, or else, while bearing their share of the burden for the support of public education, provide the means from their own pockets for the training of their offspring elsewhere. It might be reasonably apprehended that such a practice, besides being unjust and oppressive to the person immediately



concerned, would, by its tendency to the multiplication of parochial and sectarian schools, tend forcibly to the destruction of one of the most important, if not indispensable, foundation stones of our form of government. It will be an evil day when anything happens to lower the public schools in popular esteem, or to discourage attendance upon them by children of any class."

In *Wilkerson, et al. v. City of Rome, et al.*, 52 Ga. 762 (1921), the court upheld an ordinance which required some portion of the King James version of the Bible, Old or New Testament and without comment, to be read in the public schools and that a prayer be offered to God in the hearing of the pupils, with provision for excuse of a pupil upon written parental request. The ordinance was attacked by Roman Catholics as contrary to their faith and the Jewish faith. The court held that the charter that established the colony of Georgia granted complete religious liberty to all "except papists", and (at p. 769) said:

"It should be clearly understood, however, that this was not a movement for the separation of State from Christianity, but specifically a separation of Church and State. *Christianity entered into the whole warp and woof of our governmental fabric.*"

The court (at p. 766) stated that the pioneers in the formation and conduct of American colonial governments did not have in mind to bring about a complete separation of church and state.

The decision in the case at bar would seem to proceed upon the same theory, and in certain respects to follow the very phraseology of this Georgia decision, for here it has been held that theism (rather than Christianity) has entered into the governmental fabric and that in respect

of such religion or belief complete separation was not intended.

There have been a number of other cases in the State courts involving this subject matter. They emphasize further what the cases above-mentioned illustrate—that the use of the tax-supported, secular public schools and their compulsory machinery for religious instruction, exercises, services and worship, by means of Holy Bible reading, repeating of prayers or otherwise, has been and is the source of much bitter controversy and strife and the denial of religious liberty, in the States and their local school districts. The opinions and dissenting opinions in those cases recite the factual details and the arguments and counter-arguments.

There is no need of or justification for these conflicts in the public schools and the First Amendment, through the Fourteenth, was designed to prevent them by separating the spheres of religious and civil authority and activity. Religion is taught and should only be taught (by prayer, reading and studying the Bible or other sacred books and other exercises and devotions) in the homes, churches and religious schools where the truths of religion can be most effectively learned and enforced. In the American concept of government the State has no right to interfere with such religious activities. By the same token, the State, being a civil institution should not enter into the field of religious instruction through the facilities of its public schools supported and attended by persons having a wide variety of beliefs in respect of religion.

### Conclusion

The State of New Jersey, by these statutes and the practices under them, and through its public school system, is not being neutral in its relations to groups of believers and

non-believers. It has made man's relation to his God the concern of the State. It has fused spheres of religious activity and civil authority. It is utilizing the State's tax-supported and tax-established public school system to aid faiths and is putting the momentum of its whole public school atmosphere and system behind religious instruction. It is using tax-supported property for religious instruction and exercises. It is providing pupils for religious services and exercises through use of the State's compulsory public school machinery. It is using its state power and laws to aid some religions and to prefer some religions over others. It is using taxes raised for secular public schools to support religious activities. It is commingling religious and secular instruction in the public schools.

All of this, we believe, is contrary to the principles underlying the First and Fourteenth Amendments of the United States Constitution and set forth by this Court in the *Everson* and *McCullum* cases. This is not a separation of Church and State. Separation means separation, not something less. The principle should be enforced in its full integrity.

Respectfully submitted,

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**Supreme Court of the United States**

October Term, 1951.

CHARLES E. MORE CROPLEY  
CLERK

No. 9.

**DONALD R. DOREMUS and ANNA E. KLEIN,**

*Appellants,*

**vs.**

**BOARD OF EDUCATION OF THE BOROUGH OF  
HAWTHORNE AND THE STATE OF NEW JERSEY,**

*Respondents.*

**Appeal from the Supreme Court of the State of New Jersey.**

**CHIEF OF STATE COUNCIL OF THE JUNIOR ORDER  
OF UNITED AMERICAN MECHANICS OF THE  
STATE OF NEW JERSEY, AS AMICUS CURIAE.**

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**SUPREME COURT OF THE UNITED STATES.**

October Term, 1951.

No. 9.

**DONALD R. DOREMUS AND ANNA E. KLEIN, —**  
**Appellants,**

**vs.**

**BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE AND  
THE STATE OF NEW JERSEY,**  
**Respondents.**

**APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW  
JERSEY.**

**BRIEF OF STATE COUNCIL OF THE JUNIOR ORDER  
OF UNITED AMERICAN MECHANICS OF THE  
STATE OF NEW JERSEY, AS AMICUS CURIAE.**

**This brief is filed with the consent of the parties.**

## INTEREST OF AMICUS CURIAE.

The State Council of the Junior Order of United American Mechanics of the State of New Jersey is a fraternal patriotic order, and was incorporated in the year 1875. It has approximately 20,000 members throughout the State of New Jersey, and is affiliated with similar fraternal patriotic orders in other states. One of its objects, as stated in its State Council Constitution, is to foster the public school system, "to prevent sectarian interference therewith, and uphold the reading of the Holy Bible therein." Throughout its long history, it has taken a keen interest in all matters pertaining to the public schools and has actively supported legislation and various movements conducive to the improvement of the public schools. It is not a labor organization, as was supposed by the late Mr. Justice Rutledge in the case of *Everson v. Board of Education*.<sup>1</sup> Its members are "mechanics" in the same sense that members of the Masonic Order are "masons."

It believes in the historic, basic American principle of separation of church and state, and that only by its steadfast observance can the religious freedom of all the people be assured, but it believes that the reading of the Bible and reciting of the Lord's Prayer in the opening exercises of the public schools is not a violation of that principle. A brief amicus curiae was filed by it in the *Everson* case, and the writer of this brief was counsel for Mr. Everson in the New Jersey Court of Errors and Appeals,<sup>2</sup> and was associated with counsel for Mr. Everson in this Court. We there urged that transportation of children to sectarian schools, at

<sup>1</sup> 330 U. S. 1, 54; note 45.

<sup>2</sup> 133 N. J. L. 350, 44 A. 2d 333.

public expense, was a violation of the principle of separation of church and state and the "establishment of religion" clause of the First Amendment. We disclaim, however, any desire in that case to advance the proposition that the First Amendment prohibits all relation between religion and state. On the contrary, we believe that government recognition of God as the author of our liberties and all the principles of morality has been one of the greatest factors contributing to our national unity. For that reason we feel impelled to oppose the attack made in this case upon Bible reading in the public schools, which, as Mr. George E. Reed<sup>3</sup> says in an article in the February 1950 issue of Catholic Action, "from the very inception of this Country has been an integral part of our school system." Our opposition to appellants' views is not motivated in any way by hostility to any person because of his religious beliefs or disbeliefs, but by a firm conviction that the reading of the Bible and the repeating of the Lord's Prayer in the opening exercises of the public schools is in accordance with the Judaeo-Christian concept of the relation of man to God and of man to man, which is the very essence of American Democracy.

### OPINIONS BELOW.

The opinion of the Supreme Court of New Jersey (R. 22-38) is reported in 5 N. J. 435, 75 A. 2d 880. It affirmed a decision of the Superior Court of New Jersey, Law Division, whose opinion (R. 7-16) is reported in 7 N. J. Super. 442, 71 A. 2d 732.

<sup>3</sup> Member of the legal staff of National Council of Catholic Men and National Council of Catholic Women.

## STATEMENT OF THE CASE.

The appellant Donald R. Doremus, as a taxpayer, and the appellant Anna E. Klein, as a taxpayer and as the mother of a child attending one of the public schools conducted by the Appellee Board of Education, filed suit in the Superior Court of New Jersey, Law Division, to enjoin the reading of the Bible and the repeating of the Lord's Prayer in the public schools (R. 1, 5). It was stipulated that a directive issued by the Appellee Board of Education provides that "any student may be excused during reading of the Bible upon request," and that in the present case neither Appellant Klein nor her child made a request that the child be excused (R. 5). Unsuccessful in the State Superior Court (R. 6-20) and in the State Supreme Court (R. 21-38), appellants obtained an order by Mr. Justice Burton allowing an appeal to the Supreme Court of the United States (R. 38-39). Thereafter, on March 12, 1951, this Court made an order postponing to the hearing on the merits further consideration of the question of jurisdiction and of appellees' motion to dismiss or affirm (R. 43).

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## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED.

The purpose of appellants' suit is to test the constitutionality of two sections of the Revised Statutes of New Jersey (1937).

R. S. 18:14-77 provides:

"At least five verses taken from that portion of the Holy Bible known as the Old Testament shall be read,



or caused to be read, without comment, in each public school classroom, in the presence of the pupils therein assembled, by the teacher in charge, at the opening of school upon every school day, unless there is a general assemblage of the classes at the opening of the school on any school day, in which event the reading shall be done, or caused to be done, by the principal or teacher in charge of the assemblage and in the presence of the classes so assembled."

R. S. 18:14-78 provides:

"No religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools."

These statutes are attacked as violative of the First and Fourteenth Amendments to the United States Constitution, which provide in part:

#### First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; \* \* \*"

#### Fourteenth Amendment

"\* \* \* No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws \* \* \*"

## **QUESTION PRESENTED.**

The question presented in this case, and to which this brief is addressed, is the validity under the First and Fourteenth Amendments to the Constitution of the United States of two New Jersey statutes, R. S. 18:14-77, which directs the reading of at least five verses from that portion of the Bible known as the Old Testament, without comment, in the opening exercises of the public schools, and R. S. 18:14-78, which permits the repeating of the Lord's Prayer in such opening exercises.

## **SUMMARY OF ARGUMENT.**

### **I.**

The First Amendment is the political expression of a religious concept and does not disestablish government promulgation of non-sectarian religion.

### **II.**

The Virginia Bill for Religious Liberty did not disestablish state promulgation of non-sectarian religion.

## III.

The proceedings of the First Congress display an intent that government promulgation of non-sectarian religion should not be disestablished by the First Amendment.

## IV.

The First Amendment and the principle of separation of church and state have never been construed to require disestablishment of all relations between government and religion.

## V.

The First Amendment, as made applicable to the states by the Fourteenth Amendment, does not disestablish Bible Reading and the repeating of the Lord's Prayer in the public schools.

## VI.

Appellants' rights of conscience or freedom of intellect have not been infringed.

## ARGUMENT.

### Point I.

The first amendment is the political expression of a religious concept and does not disestablish government promulgation of non-sectarian religion.

"We hold these truths to be self-evident, that all men are created equal, that they are *endowed by their Creator*<sup>\*</sup> with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."<sup>4</sup>

"Can the liberties of a nation be thought secure when we have removed *their only firm basis*, a conviction in the minds of the people that these liberties are of the gift of God?"<sup>5</sup>

"When we assemble together, fellow citizens, to consider the state of our beloved country, our just attentions are first drawn to those pleasing circumstances which mark the goodness of that Being from whose favor they flow, and the large measure of thankfulness we owe for his bounty."<sup>6</sup>

"In conformity with the principles of our Constitution, which places all sects of religion on an equal footing, \* \* \* we have proposed no professor of divinity; and the rather as the proofs of the being of a God, the

\* All italics ours unless otherwise indicated.

<sup>4</sup> Declaration of Independence.

<sup>5</sup> Padover, *The Complete Jefferson*, p. 677.

<sup>6</sup> Jefferson's second message to Congress. *Id.*, 394. "I shall need, too, the favor of that Being in whose hands we are, who led our forefathers, as Israel of old, \* \* \* and to whose goodness I ask you to join with me in supplications \* \* \*." Jefferson's Second Inaugural Address. *Id.*, p. 414.



creator, preserver, and supreme ruler of the universe, the author of all the relations of morality, and of the laws and obligations these infer, will be within the province of the professor of ethics; \* \* \* a basis will be formed common to all sects. Proceeding thus far *without offense to the Constitution*, we have thought it proper at this point to leave every sect to provide, as they think fittest, the means of further instruction in their own peculiar tenets."<sup>7</sup>

We cannot believe that the great author of those words would have joined in appellants' contention that the reading of the Bible and the repeating of the Lord's Prayer in the opening exercises of the public schools "are such an intermingling of religion and government as are clearly repugnant to the First and Fourteenth Amendments of the United States Constitution."<sup>8</sup>

While "the clear extremes represented by political clerics and robed politicians"<sup>9</sup> do not provide a safe guide to a determination of the limits of government promulgation of religion, we cannot, like Descartes, "shut up alone in a stove," eliminate from our minds "all tradition"—all that has come down to us from the past—and hope to resolve the question with "the absolute precision of mathematics," which furnishes "an exacting standard for truth which no generally accepted facts of nature or history could fully meet."<sup>10</sup>

<sup>7</sup> Jefferson's statement relative to the tax-supported University of Virginia. Id., 1104.

<sup>8</sup> Appellants' brief, p. 6.

<sup>9</sup> University of Pennsylvania Law Review (Dec., 1947), Vol. 95, p. 230.

<sup>10</sup> Henry P. Van Dusen, *God in Education* (New York, 1951), pp. 23, 24, 25. "Descartes assumed that every seeker after truth should begin his quest *de novo*, without reference to previous discoveries. \* \* \* In the wider corporate scene, this is the essence of Modernism—disdain of the wisdom of the past, assumption of the authority of the latest: the cult of contemporaneity." Id., pp. 29, 30.

The authors of the First Amendment did not intend to abrogate all relations between religion and government. It was not designed by rationalists to break the hold which religion had upon the hearts and minds of men, or to disestablish government recognition of belief in God, as the Creator, preserver, and supreme ruler of the universe, the author of all the relations of morality and of the laws and obligations these infer,<sup>11</sup> and as the author of our liberties.<sup>12</sup>

An understanding of the historical foundations of our religious freedom leads inevitably to the conclusion that the guarantees of religious liberty contained in the First Amendment are not merely the expression of a political

<sup>11</sup> See note 7. "The promulgation of the great doctrines of religion, the being, and attributes, and providence of one Almighty God; the responsibility to him for all our actions, founded upon moral freedom and accountability; \* \* \* these never can be a matter of indifference in any well-ordered community. It is, indeed, difficult to conceive how any civilized society can well exist without them. \* \* \* This is a point wholly distinct from that of the right of private judgment in matters of religion, and of the freedom of public worship according to the dictates of one's conscience." Joseph Story, *Commentaries on the Constitution of the United States* (5th edition, 1833), Vol. 2, p. 629. "An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created uniform disapprobation, if not universal indignation." *Id.*, p. 631 (citing 2 Lloyd's Debates, 195, 196). "It was never intended by the Constitution that the Government should be prohibited from recognizing religion—where it might be done without drawing any invidious distinctions between different religious beliefs, organizations, or sects." Cooley's principles of Constitutional Law, 3d edition, 1898, pp. 224, 225.

<sup>12</sup> See notes 4 and 5. The inscription on the Liberty Bell is taken from the Bible: "Proclaim liberty throughout the land unto all the inhabitants thereof." Leviticus 25:10. The Psalmist said to God: "I will walk at liberty; for I will seek thy precepts." Psalms 119:45. The Founder of Christianity added: "Ye shall know the truth, and the truth shall make you free." John 8:32. A verse in one of St. Peter's Epistles sums up the teaching of the Bible relative to liberty: "Live like free men, only do not make your freedom a pretext for misconduct; live like servants of God." 1 Peter 2:16 (Moffatt translation). It is significant that a thoughtful publicist with a Jewish background, Walter Lippmann, "identified in the public mind with the point of view of reverent agnosticism" (Anson Phelps Stokes, *Church and State in the United States*—New York, 1950—Vol. III, p. 591) emphasizes the fact that freedom has a spiritual basis: "For in the recognition that there is in each man a final essence—that is to say, an immortal soul—which only God can judge, a limit was set upon the dominion of men over men. \* \* \* Upon this rock they have built the rude foundations of the Good Society." Walter Lippmann, *The Good Society* (1937), p. 378.

conviction of the founding fathers but a religious concept as well,<sup>13</sup> but it is not a sectarian concept. It is interesting to note, however, that one of the law review writers has expressed the thought, with a great deal of confidence in his conclusion, that the First Amendment pronounces a Protes-

<sup>13</sup> Walter Lippmann has reached that conclusion: "What separates us from the totalitarian regimes is our belief that man does not belong to the state. . . . They said that man belonged to his Creator, and that since he was, therefore, an immortal soul, he possessed inalienable rights as a person which no power on earth had the right to violate. . . . The liberties we talk about defending today were established by men who took their conception of man from the great central religious tradition of Western civilization, and the liberties we inherit can almost certainly not survive the abandonment of that tradition." N. Y. Herald-Tribune, Dec. 17, 1938; Stokes, Vol. III, p. 706. "Thus, working upon the minds of men for two thousand years, the Judaic-Christian revelation in due time brought forth the political philosophy of democracy. . . . Freedom, as we know it, is the political projection of a religious idea founded in faith in the fatherhood of God and brotherhood of man. Without that faith it has neither foundation nor sustenance. Liberty cannot survive in a world of cynicism." Sermon on Religion and Democracy, issued by the office of Civilian Defense, Nov. 3, 1941; N. Y. Times, Nov. 9, 1941; Stokes, Vol. III, pp. 893, 894. Wendell Wilkie said: "They did not begin with Life, Liberty and the Pursuit of Happiness and work their way back to God. They began with God. Life, Liberty and the Pursuit of Happiness, were, to them, inalienable human rights, because of that starting place." Stokes, Vol. III, p. 701. "Thus from our earliest recorded history, Americans have thanked God for their blessings. In our deepest natures, in our very souls, we, like all mankind since the earliest origin of mankind, turn to God in time of trouble and in time of happiness. 'In God We Trust'." The late President Franklin D. Roosevelt's 1938 Thanksgiving Day Proclamation, New York Times, Nov. 20, 1938; Stokes, Vol. III, p. 190. The connection between democracy and the Jewish-Christian tradition has been emphasized by the Rabbinical Assembly: "Only a democratic form of government is consistent both with Jewish religious evaluation of the dignity of the human soul and with its affirmation of the brotherhood of all men." Stokes, Vol. III, p. 699.

There are "principles of abstract justice, which the Creator of things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree the rights of civilized nations." Johnson and Graham's *Lessee v. McIntosh* (1823), 8 Wheaton (U. S.) 543, 572 (Opinion by Chief Justice Marshall).

"We are a Christian people. . . . according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God." *United States v. MacIntosh* (1931), 283 U. S. 605, 625. "One cannot speak of religious liberty, with proper appreciation of its essential and historical significance, without assuming the existence of a belief in supreme allegiance to the will of God." *Id.*, pp. 633, 634 (dissenting opinion of the late Chief Justice, Hughes, concurred in by Justices Holmes, Brandeis and Stone). The American organic utterances "speak the voice of the entire people" and "affirm and reaffirm that this is a religious nation." *Church of the Holy Trinity v. United States* (1892), 143 U. S. 457, 470.



tant concept or belief and has "preserved that belief as a living part of our constitutional heritage."<sup>14</sup> Another writer emphatically states that the First Amendment is not based upon any sectarian concept, not even James Madison's sectarian concept, and that Madison's total concept with respect to the relation between government and religion was a sectarian concept and "could not have been poured into the First Amendment in 1791, and by the same token it cannot be now."<sup>15</sup>

If some of Madison's writings late in life are to be regarded as expressing his total concept of the relation between government and religion, it may well be doubted that it was poured into the First Amendment. Long after he left the Presidency he expressed himself, in his essay on Monopolies,<sup>16</sup> as opposed to exemption of houses of worship from taxation, incorporation of ecclesiastical bodies with the capacity of acquiring property.<sup>17</sup> Thanksgiving day procla-

<sup>14</sup> Harvard Law Review, Vol. 64, pp. 172-175. Mr. Justice Jackson, in his dissenting opinion in the *Everson* case (1947), says: "Our public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values." 330 U. S. 1, 23. His concurring opinion in the *McCullum* case (1948), 333 U. S. 203, 232, definitely indicates, however, that he does not agree with the writers who believe that, while the Protestant concept so completely predominated in the public schools during the early part of the eighteenth century that instruction in the schools included Protestant sectarianism, the twentieth century version of that concept requires absolute and complete secularism in the schools to the exclusion of all religion.

<sup>15</sup> One of eight articles on Religion and the State published in Law and Contemporary Problems, Duke University Law School (1949), Vol. 14, No. 1, p. 23, at pp. 28-32. "And if there is one thing that the First Amendment forbids with resounding force it is the intrusion of a sectarian philosophy of religion into the fundamental law of the land." *Id.*, p. 30.

<sup>16</sup> Fleet, Madison's Detached Memoranda, 3 William and Mary Quarterly (1946), pp. 534, 558.

<sup>17</sup> This Court has said: "While, therefore, the legislature might exempt the citizens from a compulsive attendance and payment of taxes in support of any particular sect, it is not perceived that either public or constitutional principles required the abolition of all religious corporations." *Terrett v. Taylor* (1815), 9 Cranch 43, 49 (U. S.).



mations, and chaplains in Congress and the army and navy. The whole course of action pursued by our Presidents (including Madison) and the Congress show conclusively that his views regarding those things have been rejected as a proper interpretation of the First Amendment.

Madison in his Memorial and Remonstrance said: "Such a government will be best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another."<sup>18</sup>

Later he was very much concerned about the attempt "to insert the words 'Jesus Christ' after the words 'Our Lord' in the preamble" of the Virginia Bill For Religious Liberty, "the object of which," he said "would have been to imply a restriction of the liberty defined in the Bill to those professing his religion only."<sup>19</sup> It is significant that he expressed no concern whatever about the implications arising

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<sup>18</sup> Appendix to *Everson v. Bd. of Ed.* 330 U. S. 1, 63. When he said that "Religion is wholly exempt from its (Civil Society's) cognizance," in his Memorial and Remonstrance (par. 1), he was referring to dogmatic (sectarian) religion. This is evident from the fact that the Memorial and Remonstrance was directed against a bill providing state support of sectarian religion, i.e., all the sects of the Christian religion. It was a "Bill establishing a provision for Teachers of the Christian Religion." His whole concept of the relation between government and religion is based upon the premise that "before any man can be considered as a member of civil society, he must be considered as a subject of the Governor of the Universe," and he defines "religion" as the "duty which we owe to our Creator" (Par. 1). The Memorial is directed against "the establishment proposed" (Par. 6, 9); "The establishment in question" (Par. 8); establishment of "Christianity, in exclusion of all other religions" (Par. 3); i.e., in exclusion of Jews and other non-Christians who believe in the Creator; establishment of "any particular sect of Christians" (Par. 3); "ecclesiastical establishments" (Par. 7, 8); and "established clergy" (Par. 8). He could not have believed that there should be separation of non-sectarian religion and State because he concludes the Memorial and Remonstrance with a prayer to the "Supreme Lawgiver of the Universe" to "guide them (members of the State Legislature) into every measure which may be worthy of his blessing."

<sup>19</sup> Fleet, *Madison's Detached Memoranda*, 3 William and Mary Quarterly, p. 556.

from the inclusion of the non-sectarian words "Almighty God" and "holy author of our religion" in that preamble.

There can be no doubt that Madison believed in "the total separation of the Church from the State"<sup>20</sup> and in "the perfect equality of rights which it secures to every religious sect."<sup>21</sup> To him "a perfect separation between ecclesiastical and civil matters" was of utmost importance.<sup>22</sup>

That Madison used the word "religion" to mean sectarian religion in such phrases as "separation of government and religion" or "establishment of religion" or "alliance between law and religion," is exemplified by his statement, made in 1823, that "relaxation of the alliance between law and religion" had reached its consummation in Pennsylvania, Delaware and New Jersey.<sup>23</sup> Those three States and all the other States, at that time and ever since, have promulgated or fostered non-sectarian religion.

Dogmatic (sectarian) religion is in its very nature a personal, private and interior matter of the individual conscience, having no relation to the public concern of the State. Between it and the State there can be no official re-

<sup>20</sup> Letters and Other Writings of James Madison (Published by order of Congress, Phila., 1865), Vol. III, p. 125.

<sup>21</sup> Id., p. 179.

<sup>22</sup> Id., p. 275. "The peculiarity in the institution (University of Virginia) which excited at first most attention, and some animadversion, is the omission of a theological professorship. The public opinion seems now to have sufficiently yielded to its incompatibility with a State institution, which necessarily excludes **sectarian preferences**." Id., p. 475. The University of Virginia now has on its faculty a "professor of religion". Stokes, Vol. II, p. 634.

<sup>23</sup> "The settled opinion here (Virginia) is, that religion is essentially distinct from civil government, and exempt from its cognizance; \* \* \* that a legal establishment of religion without a toleration could not be thought of, and with a toleration, is no security for public quiet and harmony, but rather a source itself of discord and animosity; and, finally, that these opinions are supported by experience, which has shown that every relaxation of the alliance between law and religion, from the partial example of Holland to its **consummation** in Pennsylvania, Delaware, New Jersey, &c., has been found as safe in practice as it is sound in theory." Letters and Other Writings of James Madison, Vol. III, pp. 307, 308.

lation. The State cannot aid or foster it in any form or degree however slight. Non-dogmatic (non-sectarian) religion, however, is not and never has been a wholly private matter. It has always been the practice of our government to appeal to the "Supreme Judge of the world for the rectitude of our intentions" with respect to public transactions, and never has our government departed from "a firm reliance on the protection of Divine Providence."<sup>24</sup> Our children have been taught in our schools from the earliest days to the present time that our civil and religious liberties were derived from God "Who hath made and preserved us a nation,"<sup>25</sup>

The statements that "religion and law are twin sisters,"<sup>26</sup> and that "in this happy country of ours religion and liberty are natural allies,"<sup>27</sup> and that "it is the duty of nations as well as of men to own their dependence upon the overrul-

<sup>24</sup> Declaration of Independence. Jefferson, in his first inaugural address, said: "And may that Power which rules the destinies of the universe, lead our councils to what is best, and give them a favorable issue for your peace and prosperity." Padover, pp. 385 and 387. See his references to the guidance of Providence in the affairs of our country, in his second inaugural address and his first, second and third annual messages to Congress. Padover, pp. 387, 394, 404, 414. Madison, in his first inaugural address, mentions the "Almighty Being whose power regulates the destiny of nations, whose blessings have been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future." Messages and Papers of the Presidents, Richardson (1896), Vol. I, p. 466, at 468. In his first annual message to Congress, he said: "We are indebted to that Divine Providence whose goodness has been so remarkably extended to this rising nation, it becomes us to cherish a devout gratitude, and to implore from the same omnipotent source a blessing on the consultations and measures about to be undertaken for the welfare of our beloved country." Id., p. 478.

<sup>25</sup> Star Spangled Banner.

<sup>26</sup> Works of James Wilson (Andrews ed. 1896), p. 94. "He (Wilson) spoke not simply for himself but for a sanguine generation which saw no insuperable difficulty in reconciling that proposition with the faith that the health of society would be improved were the power of churches separated from the authority of government." Harvard Law Review, Vol. 64, p. 170.

<sup>27</sup> Statement of Theodore Roosevelt. Stokes, Vol. I, p. xlii.



ing power of God; \* \* \* and to recognize the sublime truth, announced in the Holy Scriptures and proved by all history, that those nations only are blessed whose God is the Lord,"<sup>28</sup> can be true only if a distinction is made between government promulgation of non-sectarian religion and its support of sectarian religion.

Dr. Stokes says that "probably no other historical scholar has studied the background of modern Church-State relations as thoroughly as Professor Frederick Heinrich Geffcken," who reached the conclusion that "there is no true morality without religion," that it is a vain thing to "attempt to supply by philosophy and abstract morality the want of religion," and that to "completely isolate" government from religion would be "disastrous to the nation."<sup>29</sup> The same thought is expressed in Washington's Farewell Address, in which he emphatically states that we cannot expect "that national morality can prevail in exclusion of religious principle," and that "morality is a necessary spring of popular government."<sup>30</sup>

<sup>28</sup> Statement of Lincoln. Stokes, Vol. I, p. xlii. "Storms from abroad directly challenge three institutions indispensable to Americans, now as always. The first is religion. It is the source of the other two—democracy and international good faith." Speech of Franklin D. Roosevelt to Congress, N. Y. Times, Jan. 5, 1939; Stokes, Vol. III, p. 704.

<sup>29</sup> " \* \* \* the State can never dispense with religion for the moral education of its subjects, since there is no true morality without religion. The example of individuals who, having broken with religious belief, still conform to morality, proves nothing to the contrary; for men, such as these, regulate their conduct, however unconsciously, by the civilization of the nation to which they belong, and which in turn is saturated with religious elements. \* \* \* The civilization of all States alike is based, in the first instance, upon religion; and where the latter is obliterated, as during the later period of the Roman Republic, or in France under Louis XV, their discipline and moral rectitude rapidly decline; the foundations of the State itself have become rotten, and give warnings of impending ruin." Friedrich Heinrich Geffcken, Church and State—Their Relations Historically Developed (London, 1877), Vol. I, p. 14; Stokes, Vol. III, pp. 659, 660.

<sup>30</sup> "Of all the dispositions and habits, which lead to political prosperity, Religion and Morality are indispensable supports. \* \* \* A volume could not trace all their connections with private and public felicity.



In *Everson v. Board of Education*,<sup>31</sup> it was held that "there is every reason to give the same application and broad interpretation to the 'establishment of religion' clause" as has been given by the Court to the free exercise of religion clause. Therefore, if the First Amendment commands that a state shall make no law prohibiting the free exercise of religion or *non-religion*,<sup>32</sup> it also commands that a state shall make no law respecting an establishment of religion or *non-religion* in the public schools.<sup>33</sup> If it commands that a state shall make no law prohibiting the free exercise of sectarian religion, it also commands that a state shall make no law respecting an establishment of sectarian religion. The

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Let it simply be asked, Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths, which are the instruments of investigation in Courts of Justice? . . . What ever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect, that national morality can prevail in exclusion of religious principle. Who, that is a sincere friend to it, can look with indifference upon attempts to shake the foundations of the fabric?" Washington's Farewell Address, C. R. Gaston edition, in *Standard English classics*. "Lastly our ancestors established their system of government on morality and religious sentiment. Moral habits, they believed, cannot safely be trusted on any other foundation than principle, nor any government be secure which is not supported by moral habits." *Writings and Speeches of Daniel Webster*, Vol. I, p. 200; Stokes, Vol. III, p. 703.

<sup>31</sup> 333 U. S. 1, 15. The dissent, agreed to by four judges said that the word "Religion," although it appears only once in the First Amendment "governs two prohibitions and governs them alike." *Id.*, p. 32.

<sup>32</sup> The term "religion" cannot include non-religion or non-belief because it has "reference to one's views of his relations to his Creator." *Davis v. Beason* (1890), 133 U. S. 333, 342. It is "the duty which we owe to our Creator." Madison's Memorial and Remonstrance, Par. 1. The freedom of intellect, freedom of mind or freedom to disbelieve of the atheist, free thinker or secularist is, of course, guaranteed by the due process clause of the Fourteenth Amendment. It is upon that Amendment, not the First Amendment, that the free thinker himself bases his liberty of mind or intellect or freedom to disbelieve. "Non-religious people appeal more to the 'equal protection' clause of the Fourteenth Amendment than to the 'establishment' clause of the First." Frank Swancara, *Separation of Religion and Government*, pp. 51, 52.

<sup>33</sup> If the First Amendment prohibits all religion, including non-dogmatic (non-sectarian) religion, in the public schools, it establishes the beliefs or disbelief of the atheist, freethinker or secularist.

latter interpretation is in accord with the meaning of the word "religion."<sup>34</sup> The establishment of any or all sectarian religions is what was disestablished when the First Amendment forbade "an establishment of religion."<sup>35</sup> The First Amendment's prohibition of legislation for the support of any religious tenets, or the modes of worship of any or all sects or denominations is not disestablishment of government promulgation of the proofs of the being of a God, the Creator, preserver and supreme ruler of the universe, the author of all the relations of morality and of the laws and obligations which these infer. Any attempt to disestablish government recognition of non-sectarian belief in God would have met with the disapprobation of the authors of the First Amendment.

The First Amendment, as made applicable to the states by the Fourteenth Amendment,<sup>36</sup> commands that a state shall make no "law respecting an establishment of religion, or prohibiting the free exercise thereof," and there can be no doubt, in view of the *Everson* and *McCollum* cases, that it embodies the principle of separation of church and state. In view of those decisions, the words "establishment of religion" mean more than "merely to forbid an established church."<sup>37</sup>

<sup>34</sup> See note 32.

<sup>35</sup> As early as 1890, this Court interpreted the "establishment of religion" clause "to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect." *Davis v. Beason* (1890), 133 U. S. 333, 342.

<sup>36</sup> *Everson v. Bd. of Ed.* (1947), 330 U. S. 1, 8; *McCollum v. Bd. of Ed.* (1948), 333 U. S. 203, 210.

<sup>37</sup> *McCollum v. Bd. of Ed.*, 333 U. S. 203, 213. As thus interpreted and applied, the First Amendment was held to prohibit state aid "to any or all religious faiths or sects, in the dissemination of their doctrines" (Id., p. 211). The Court condemned, as unconstitutional, "close co-operation between the school authorities and the religious council"; the State's compulsory education system's assistance to and integration with "the program of religious instruction carried on by separate religious sects" (Id., p. 209); and "utilization of the tax-established and

In the *Everson* case, Mr. Justice Black said that "these words of the First Amendment reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out." Continuing, he said that whether the New Jersey law authorizing use of public funds for transportation of children to private schools, including sectarian schools, "is one respecting an 'establishment of religion' requires an understanding of the meaning of that language," and, therefore, he deems "it is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted."<sup>38</sup> His review of that period<sup>39</sup> shows that the evils which were intended to be stamped out by the First Amendment were "bondage of laws which compelled them to support and attend *government favor churches*"; "turmoil, civil strife, and persecutions, generated in large part by *established sects*";<sup>40</sup> "power of government supporting" *sects*. "In efforts to force loyalty to whatever *religious group* happened to be on top and in *league with the government* of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed." Those punishments had been inflicted for "such things as speaking disrespectfully of the views of

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tax-supported public school system to aid religious groups to spread their faith" (Id., p. 210). "The State also affords *sectarian groups* an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery" (Id., p. 212). The concurring opinion of Mr. Justice Frankfurter, in which three other Justices joined, says: "Illinois has here authorized the commingling of *sectarian* with secular instruction in the public schools. The Constitution of the United States forbids this" (Id., p. 212). *Appellants' brief misquotes this statement* (Brief, p. 9). Counsel overlooked the fact that the word "religious" appearing in the original opinion was changed in two places (pp. 212 and 220) to "sectarian." See front cover of *Lawyers' Edition Advance Opinions*, Vol. 92, No. 12.

<sup>38</sup> 330 U. S. 1, 8.

<sup>39</sup> Id., pp. 8-13.

<sup>40</sup> Id., p. 8.



ministers of government-established churches, non-attendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them";<sup>41</sup> and dissenters were compelled "to pay tithes and taxes to support government-sponsored churches, whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters."<sup>42</sup> Every one of the evils recited by Justice Black arose from government aid to religious groups in league with the government, churches, sects, established faiths and doctrines. Not one of them arose from non-sectarian recognition of God by government "in public transactions and exercises," such as "opening legislative sessions with prayer or the reading of the Scriptures."<sup>43</sup>

The secularists demand that government give no en-

<sup>41</sup> Id., p. 9.

<sup>42</sup> Id., p. 10. Mr. Justice Black concludes this list of evils, intended to be stamped out by the First Amendment, with the statement that: "These practices became so commonplace as to shock the freedom-loving colonists into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment." Id., p. 11. Mr. Justice Black cites (Id., p. 15, note 21) *Reuben Quick Bear v. Leupp*, 210 U. S. 50, in which it was indicated that "the government is necessarily **und denominational** as it cannot make any law respecting an establishment of religion"; and *Davis v. Beason*, 133 U. S. 333, in which it was said that "the First Amendment was intended \* \* \* to prohibit legislation for support of any religious tenets, or the modes of worship of any sect." He enunciates the principle that "neither a State nor the Federal Government \* \* \* can pass laws which aid one religion, aid all religions, or prefer one religion over another" (330 U. S. 1, 15), but he uses the word "religion" to mean "sectarianism", because he says that "the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State'" (Id., p. 16), and in applying that principle to the precise issue before the Court (transportation of children to sectarian schools), he says: "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church." Id., p. 16.

<sup>43</sup> "No principle of constitutional law is violated \* \* \* when legislative sessions are opened with prayers or the reading of the Scriptures." Cooley's Constitutional Limitations (8th ed., 1927), Vol. II, p. 974.



couragement or countenance whatever to religion; that all religion be eliminated from public education and other public exercises and transactions; that churches be taxed; that the employment of chaplains in Congress, state legislatures, army, navy and public institutions be discontinued; that all religious services now sustained by government be abolished; that the use of the Bible in the public schools be prohibited; that Thanksgiving day proclamations of the President and governors of the various states shall cease; that the judicial oath in the courts and official oaths at inaugurations and in all departments of government be abolished; that all laws enforcing the observance of Sunday be repealed; that all laws looking to the enforcement of Christian morality be abrogated, and that all laws shall be conformed to the requirements of "natural morality, equal rights and impartial liberty"; that our national motto "In God We Trust" be removed from our coins; that the "Church" flag above the national flag on battleships shall not be permitted; that religion shall not be "bootlegged" through dismissing of pupils for religious instruction during school hours; that marriage be completely secularized, with divorce upon request; that our entire political system shall be founded and administered on a purely secular basis; and that every trace of religion be eliminated from government procedure.<sup>44</sup>

In fact, the secularists demand not only separation of church and State but absolute and complete divorce of the State from religion.<sup>45</sup> They disregard religion as an im-

<sup>44</sup> Stokes, Vol. III, pp. 593, 594; Frank Swancara, *Separation of Religion and Government* (New York, 1950), pp. 148, 149. The words of Mr. Justice Jackson were prophetic: "We are likely to have much business of the sort." *McCullum v. Board of Ed.* (1948), 333 U. S. 203, 238.

<sup>45</sup> "But let us remember that to try to prevent the State from the encouragement of religion, as distinct from the encouragement of theological creeds or ecclesiastical organizations, is both constitutionally unnecessary and politically unwise. The words of Plutarch may well be recalled: 'There never was a state of atheists. . . . Sooner may a city stand without foundations than a state without belief in the gods. This is the bond for all society and the pillar of all legislation.'" Stokes, Vol. III, p. 595.

portant consideration in life, and insist upon abstention by the State and its various agencies from any recognition of religion.<sup>46</sup>

Government recognition of God has never been considered by our nation or any of the States to be an establishment of religion or an encroachment upon the rights of conscience. In the light of our Judaeo-Christian tradition, it would be strange that a people, who regard religion as the basis of their civil and religious liberty, should put beyond the pale of the law, religious observances and exercises held sacred by almost the whole body of the people.<sup>47</sup> Such observances and exercises involve encouragements of religion which all religious sects share and which are part of the warp and woof of our national tradition.

The very essence of democracy is the Judaeo-Christian concept of the relation of man to God and of man to man. Democracy is the only true political expression of that concept. The Judaeo-Christian belief in God as our Creator, and the resulting corollary that if all men are children of God they must be brothers, are vital to the true concept of democracy.<sup>48</sup> Indeed, the Judaeo-Christian tradition is essential to the success of democracy. This is the basic reason why Adolph Hitler opposed that tradition; it runs counter to his ideology, which posited the inherent superiority of one race over all others and declined to consider

<sup>46</sup> Stokes, Vol. I, pp. 30, 31.

<sup>47</sup> Cooley's Constitutional Limitations (8th Edition, 1927), Vol. II, p. 974. Cf. *Pirkey Brothers v. Commonwealth*, 134 Virginia 713, 114 S. E. 764; *Lindenmuller v. People*, 23 Barb. (N. Y.) 548; *McInley v. Cools* (1855), 26 Pennsylvania 342, 347.

<sup>48</sup> The American type of democracy is based upon the Jewish-Christian religious tradition. "In this respect the spirit of democracy as we find it in the United States is the antithesis of totalitarianism in its various forms." Stokes, Vol. III, p. 679. This is why one so often hears such mottoes, or phrases as "for God and Country"; "patriotism and religion"; "religion and democracy."

the interests of a considerable minority in the population because of its racial origin.

Democracy cannot survive without the teachings and motivation of religion. To give to our public schools a completely secular atmosphere, so frequently found in continental Europe, is to strike at the very heart of the American type of democracy. For a state to continue to promulgate or sponsor non-sectarian religion is not inconsistent with the First and Fourteenth Amendments. It is not a function of the State to promote any church, sect, religious system, theological creed or ecclesiastical organization, but it may properly foster the Judaeo-Christian tradition by encouraging non-sectarian religion.

The State must never under any circumstances become anti-religious, irreligious or non-religious, and should do everything in its power, consistent with absolute and complete ecclesiastical and theological neutrality, to foster the moral and spiritual life of our people. To adopt the philosophy of the social irrelevance of all religion and its exclusion from the affairs of the state and its educational system and relegate it to the private forum of conscience is to adopt the fundamental tenet of secularism.

## Point II.

**The Virginia Bill for Religious Liberty did not disestablish state promulgation of non-sectarian religion.**

The objective of Jefferson's famous "Bill for Religious Liberty" has been referred to by this Court in its interpretation of the First Amendment.<sup>40</sup> Asserting the "natural

<sup>40</sup> "This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia Statute." **Everson v. Board of Education** (1947), 330 U. S. 1, 13.



rights of mankind,"<sup>50</sup> the Virginia Statute, nevertheless, contains recognition by the state of "Almighty God" and a promulgation by the state of the fact that it is He who "hath created the mind free." A reading of the statute and Jefferson's writings regarding what was disestablished in Virginia<sup>51</sup> impels the conclusion that state promulgation of belief in God was not disestablished.

State aid or support of any kind to any church, whether discriminatory or not, compulsion to attend or support any church or religious worship of any church or ecclesiastical society, peculiar privileges to its members, disadvantages or penalties upon those who should reject its doctrines, disadvantages or penalties for maintaining religious opinions contrary to those propagated by any church or churches were the things which were disestablished. The disestablishment of all relations between the church and state was so complete that it included abolishment of taxes levied for the support of any church, upon its own members. When this was accomplished, Jefferson regarded the Virginia establishment of religion as "entirely put down."<sup>52</sup> Nothing could be clearer than the fact that he did not regard instruction at the State University as to "the proofs of the being of a God, the creator, preserver, and supreme ruler of the universe, the author of all the relations of morality, and of the laws and obligations these infer"<sup>53</sup> as having been disestablished.

Jefferson and Madison intended to disestablish "an establishment of religion," such as the establishment of the Anglican Church in Virginia, or anything like it, but they

<sup>50</sup> "The rights hereby asserted are of the natural rights of mankind." Sec. III of the Virginia Statute.

<sup>51</sup> Padover, pp. 1141, 1142.

<sup>52</sup> Id., p. 1142.

<sup>53</sup> Id., p. 1104. See note 7.



did not intend to prohibit expression of state or national religious devotion to God. On the contrary, Jefferson asked the nation to join with him in supplications to God to guide us, as a nation, in reliance upon Him as the one "in whose hands we are, who led our forefathers" and "who has covered our infancy with his providence, and our riper years with his wisdom and power."<sup>54</sup>

As Virginia was the first state to have entire religious freedom, having inherited the Jefferson tradition, it is a striking fact that the Virginia convention which ratified the Bill of Rights appointed a chaplain who read prayers at the opening of each session.<sup>55</sup>

It is significant that the court of last resort in Virginia, the home of religious liberty, has held that "freedom of religious opinion was never intended to set at naught \* \* \* a religious observance held sacred by almost the whole body of the people."<sup>56</sup>

<sup>54</sup> Id., p. 414.

<sup>55</sup> Stokes, Vol. III, p. 140. The Bible is read in most of the public schools in Virginia. Johnson, *Church-State Relationships in the United States* (Minneapolis, 1934), p. 311. Bible reading in the schools is impliedly permitted. Bulletin No. 14 (1936), U. S. Office of Education, p. 5. The Virginia State Board of Education has prepared a series of courses of Bible study, with "Directions for Securing High School Credit for Bible Study." High School pupils are permitted to substitute such courses for one of the regular electives. After the examination papers are graded, they are sent to the "State Bible Examiner" for review of the grades. Stokes, Vol. II, pp. 501, 502, 503; Johnson and Yost, *Separation of Church and State in the United States* (Minneapolis, 1948), p. 95.

<sup>56</sup> In *Pirkey Brothers v. Commonwealth* (1922), 134 Virginia 713, 114 S. E. 764, the Court, after quoting "Mr. Jefferson's great statute of religious freedom" and other statutory and constitutional provisions, said: "It will be observed from these declarations that, while there was a fixed purpose to sever church and state, and to give the fullest freedom of conscience, and to abolish tithes and spiritual courts, there was no assault upon Christianity or any other religious faith. Indeed the constitutional provision enjoins the exercise of Christian forbearance, love, and charity. The framers of those laws knew then, as we know now, 'that we are a Christian people' and the morality of the country is deeply ingrafted upon Christianity," and freedom of religious opinion was never intended to set at naught and bring into contempt a religious observance held sacred by almost the whole body of the people."

## Point III.

The proceedings of the first congress display an intent that government promulgation of non-sectarian religion should not be disestablished by the first amendment

It is the purpose of the Constitution to "secure the Blessings of Liberty", mentioned in the Declaration of Independence, "to ourselves and our posterity."<sup>57</sup>

With a background of very definite connection of government and non-sectarian religion during the period from the Declaration of Independence to the adoption of the Constitution,<sup>58</sup> our first President and the First Congress pursued a course of action which, even to a greater extent than the traditions established by our government under the Articles of Confederation, promulgated an acknowledgment of God.

Congress had in 1782 placed its stamp of approval upon the first complete American edition of the Bible, published by Robert Aitken, by the adoption of a resolution praising it as a work "subservient to the interest of religion" and recommended "this edition of the Bible to the inhabitants

<sup>57</sup> Preamble, U. S. Constitution. The Constitution "is but the body and the letter," and the Declaration of Independence "is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence." *Gulf, Colorado and Santa Fe Ry. Co. v. Ellis* (1897), 165 U. S. 150, 160. Moreover, the word "Blessings" is a word having religious connotation.

<sup>58</sup> In the Constitutional convention Franklin said: "In the beginning of the contest with Great Britain, when we were sensible of danger we had daily prayer in this room for the divine protection. Our prayers, Sir, were heard, and they were graciously answered. To that kind providence we owe this happy opportunity of consulting in peace on the means of establishing our future national felicity." Max Farrand, *Records of the Federal Convention of 1787*, revised edition (New Haven, 1937), Vol. I, p. 450; Id., Vol. III, pp. 296, 297. Franklin, John Adams and Jefferson, were appointed by the Continental Congress on July 4, 1776, as "a committee to prepare a device for a Seal of the United States of America." *Journals of Congress—Ford Ed.* V: 517; Gaillard Hunt, *History of the Seal of the United States* (1909), p. 8; Stokes, Vol. I, p. 467. Jefferson proposed the children of Israel in the wilderness "led by a cloud by day and a pillar of fire by night." Hunt, p. 9; Stokes, Vol. I, p. 468. The seal, finally adopted in 1782 and still in the form then approved, contains the Eye of Jehovah. Hunt, p. 42; Stokes, Vol. I, 468. The same idea is expressed on the dollar bill today.

of the United States, and hereby authorize him to publish this recommendation."<sup>59</sup>

In the Ordinance of 1787 for the government of the Northwest Territory, continued in effect by act of the First Congress, August 7, 1789, after the adoption of the Federal Constitution, it was declared that "religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Lot Number 16 of every Township was set aside for the support of schools, and Lot Number 29 of every Township was set aside for the support of religion.<sup>60</sup>

President Washington kissed the Bible after taking the oath of office,<sup>61</sup> and a "divine service" at St. Paul's Chapel was part of Washington's inauguration.<sup>62</sup> It was an official service arranged for by both houses of Congress and conducted by their duly elected chaplain.<sup>63</sup>

In Washington's first address to Congress he mentioned the "Almighty Being, who rules over the universe—who presides in the councils of nations", and said: "No people can be bound to acknowledge and adore the invisible hand which conducts the affairs of men, more than the people of the United States."<sup>64</sup> Congress adopted a resolution ac-

<sup>59</sup> Stokes, Vol. I, p. 473.

<sup>60</sup> Thorpe, V., 2912; Stokes, Vol. I, pp. 480, 481. The Ohio constitution of 1802 provided that laws should be passed to secure "to each and every denomination of religious societies in each surveyed Township, which now is or may hereafter be formed in the State, an equal participation, according to their number of adherents, of the profits arising from the land granted by Congress for the support of religion, agreeably to the ordinance or act of Congress making the appropriation." Thorpe, V., 2912; Stokes, Vol. I, p. 481.

<sup>61</sup> Stokes, Vol. I, p. 486.

<sup>62</sup> Journal of the First Session of the Senate (Washington, Gales and Seaton, 1820), Journal for April 29, 1789; Stokes, Vol. I, p. 485.

<sup>63</sup> Stokes, Vol. I, pp. 485, 486.

<sup>64</sup> Annals of Congress, p. 27.



knowledging the President's address, in which it stated: "We are, with you, unavoidably led to acknowledge and adore the Great Arbiter of the universe, by whom empires rise and fall."<sup>65</sup>

The word "Religion" appears only once in the Constitution, i. e. in the First Amendment, and the word "religious" appears only in the prohibition of any religious test as a qualification for Federal office, in Article VI, Paragraph 3, which prohibition is annexed to the provision requiring oaths of office.<sup>66</sup>

New Jersey was the first state to ratify the First Amendment,<sup>67</sup> such action having been taken on November 20, 1789, while Virginia was the eleventh.<sup>68</sup>

<sup>65</sup> Id., p. 32.

<sup>66</sup> "The Senators and Representatives before mentioned, and the Members of the Several State Legislatures, and all executives and judicial officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States." U. S. Constitution Art. VI, Par. 3. This permits, but does not require, an inauguration to be a religious ceremony. The oath of office required to be taken by justices of the United States Supreme Court begins with the words "I, ....., do solemnly swear (or affirm)" and concludes with the words "So help me God." U. S. C. A. 29:453. The oath required to be taken by Federal office holders is similar. U. S. C. A. 5:16. See requirement of oath or affirmation in Article I, Sec. 3(6), and Article II, Sec. 1(8) of the Constitution, and the Fourth Amendment.

<sup>67</sup> Although New Jersey's first Constitution, adopted July 2, 1776, provided in Section 19 that "there shall be no establishment of any one religious sect in this Province in preference to another," it expressly conferred full civil rights and the right to hold public office upon Protestants only. This discrimination was eliminated by the Constitution of 1844, Art. I, Sec. 4: "There shall be no establishment of one religious sect in preference to another; no religious test shall be required as a qualification for any office or public trust; and no person shall be denied the enjoyment of any civil right merely on account of his religious principles." In adopting that provision New Jersey was "guided by the inspiring influence" of Article VI, Par. 3, of the Federal Constitution and the First Amendment. *Knibb v. Knibb* (Ct. of Errors and Appeals, 1923), 94 N. J. E. 747, 752, 21 A. 715, 717. The provisions of Art. I, Sec. 3, of the 1844 Constitution (substantially the same as Sec. 18 of the 1776 Constitution) are in part as follows: "No person shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience; \* \* \* The preamble and Art. I, Sec. 3 and 4 of the 1844 Constitution were included, without change, in the 1947 Constitution."

<sup>68</sup> Virginia postponed ratification of the First Amendment until Dec. 15, 1791 (Annals of Congress, p. 54), after it had been ratified by the



Charles Pinckney, of South Carolina, on May 29, 1787, at the constitutional convention, had urged the adoption of a provision that: "The legislature of the United States shall pass no law on the subject of religion",<sup>69</sup> but there appears to be no record of any formal discussion in the convention relative to this proposal.<sup>70</sup>

A majority of the states probably would have refused to ratify the constitution had it not been for the assurance of Washington and other leaders that a bill of rights would be approved by the First Congress when it met.<sup>71</sup>

Madison did not think that the omission of a bill of rights was a material defect.<sup>72</sup> Referring to the words of the establishment of religion clause of the First Amendment, as introduced by him, Madison said that "they had been required by some of the State Conventions."<sup>73</sup> It was, therefore, the requests of the States for amendments which induced the First Congress to propose amendments at its first session, a fact which is clearly established by the pre-

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required three-fourths of the states. Edward S. Corwin, *A Constitution of Powers in a Secular State* (Charlottesville, 1951), p. 102, note 33.

<sup>69</sup> Elliott's Debates, Vol. V, p. 131.

<sup>70</sup> Stokes, Vol. I, pp. 526, 527.

<sup>71</sup> *Maxwell v. Dow*, 176 U. S. 581, 607; Stokes, Vol. I, p. 606.

<sup>72</sup> "My own opinion has always been in favor of a bill of rights, provided it be so framed as not to imply powers not meant to be included in the enumeration. At the same time, I have never thought the omission a material defect, nor been anxious to supply it even by subsequent amendments, for any other than that it is anxiously desired by others." Letter to Jefferson, *Madison Writings* (1865), Vol. I, p. 424. On June 8, 1789, Madison clearly indicated that he was merely keeping the pledge which had been made to the states: "This day, Mr. Speaker, is the day assigned for taking into consideration the subject of amendments to the Constitution. As I considered myself bound in honor and in duty to do what I have done on this subject, I shall proceed to bring the amendments before you as soon as possible . . . ." *Annals of Congress*, Vol. I, p. 424.

<sup>73</sup> *Annals of Congress*, Vol. I, p. 757.

amble of the joint resolution of Congress submitting the Bill of Rights to the States for ratification.<sup>74</sup>

None of the amendments requested by the several states were directed against government recognition of God or government promulgation of belief in God. They embodied the principle of separation of church and State, i. e. separation of government and sectarian religion. The day following the ratification by the Virginia Convention, it adopted a proposed "declaration or bill of rights" recommended as an amendment to the Constitution, in which it is clearly indicated that it used the word "religion" to mean "religious sect or society": "That religion, or the duty which we owe to our Creator, and the manner of discharging it can be directed only by reason and conviction, not by force or violence; \* \* \* and that no particular religious sect or society ought to be favored or established, by law, in preference to others."<sup>75</sup> The same is true of the declaration contained in the ratifying resolution adopted by New York's Convention: "That the people have an equal, natural, and inalienable right freely and peaceably to exercise their religion, according to the dictates of conscience; and that no religious sect or society ought to be favored or established by law in preference to others."<sup>76</sup> North Carolina's first convention neither ratified nor rejected the Constitution, but it passed a declaration of rights which was identical with that proposed by Virginia.<sup>77</sup> Rhode Island's Con-

<sup>74</sup> "The conventions of a number of states having at the time of their adopting the Constitution expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the government will best insure the beneficent ends of its institution." 1 U. S. Stat. L. 97.

<sup>75</sup> Elliott's Debates, Vol. III, p. 659.

<sup>76</sup> Id., Vol. I, p. 328.

<sup>77</sup> Id., Vol. IV, pp. 244, 251.

vention adopted a declaration which was practically the same as the one adopted by Virginia.<sup>78</sup> The New Hampshire convention requested the following amendment: "Congress shall make no laws touching religion \* \* \*"<sup>79</sup> The amendment requested by New Hampshire was probably intended to deprive Congress of power either to establish or disestablish any sect, having in mind its own existing establishment of religion in that State. Its Constitution required its governor and members of its legislature to be of the Protestant religion, and authorized municipal support of protestant teachers of religion.<sup>80</sup> The following amendment was proposed in the Maryland convention but not adopted by it: "That there be no national religion established by law \* \* \*"<sup>81</sup>

An amendment representing Madison's philosophy regarding restraint against the states with respect to religious liberty was introduced by him but was not submitted by Congress to the states for ratification.<sup>82</sup> It did not contain a provision against an establishment of religion, probably because there were several states which then had either "single or multiple establishments". They "were all Protestant establishments, and did not include Catholics and Jews."<sup>83</sup>

<sup>78</sup> *Id.*, Vol. I, p. 334.

<sup>79</sup> *Id.*, p. 326.

<sup>80</sup> Thorpe, *Constitution*, Vol. IV, p. 2454.

<sup>81</sup> *Elliott's Debates*, Vol. II, p. 553.

<sup>82</sup> "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." *Annals of Congress*, Vol. I, p. 435. This amendment was approved by the House but was "disagreed to" by the Senate on September 21, 1789. *Annals of Congress*, Vol. I, p. 86. "Mr. Madison conceived this to be the most valuable amendment in the whole list." *Annals of Congress*, Vol. I, pp. 783, 784.

<sup>83</sup> Edward S. Corwin, *A Constitution of Powers in a Secular State* (1951), preface.

As introduced by Madison on June 8, 1789, the "establishment of religion" clause read: " \* \* \* nor shall any national religion be established."<sup>84</sup> As reported out by a committee of eleven members, it provided: "No religion shall be established by law \* \* \*."<sup>85</sup> On August 15, 1789, the House, sitting as a committee of the whole, began consideration of the proposed amendment as reported out by the committee,<sup>86</sup> and on motion made by Samuel Livermore, of New Hampshire, the clause was changed to read:

<sup>84</sup> Annals of Congress, Vol. I, p. 434: The aim of Madison in framing the First Amendment "was to strike down financial aid to religious institutions out of the public purse." Irving Brant, James Madison, The Nationalist (1948), pp. 353, 354.

<sup>85</sup> Annals of Congress, Vol. I, 729.

<sup>86</sup> "MR. SYLVESTER had some doubts of the propriety of the mode of expression used in this paragraph. He apprehended that it was liable to a construction different from what had been made by the committee. He feared it might be thought to have a tendency to abolish religion altogether. \* \* \* MR. GERRY said it would read better if it was, that no religious doctrine shall be established by law. \* \* \* MR. MADISON said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. \* \* \* to prevent these effects, he presumed the amendment was intended, and he thought it was as well expressed as the nature of the language would admit. MR. HUNTINGTON said that he feared, with the gentleman first up on this subject, that the words might be taken in such latitude as to be extremely hurtful to the cause of religion. \* \* \* By the charter of Rhode Island, no religion could be established by law; he could give a history of the effects of such a regulation; indeed the people were now enjoying the blessed fruits of it. He hoped, therefore, the amendment would be made in such a way to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all." The people of Rhode Island (a State outstanding in the history of religious liberty) were then enjoying the blessed fruits of disestablishment, but it did not include disestablishment of state recognition of non-sectarian religion. Madison made an immediate reply to Huntington, as follows: "MR. MADISON thought, if the word 'National' was inserted before religion, it would satisfy the minds of honorable gentlemen. He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought if the word 'national' was introduced, it would point the amendment directly to the object it was intended to prevent." In those words, Madison expressed the definite and well-defined desire of the states for an amendment against establishment of sectarian religion. Id., pp. 729-731.



"Congress shall make no laws touching religion \* \* \*"<sup>87</sup>

On August 20, 1789, on motion of Fisher Ames, of Massachusetts, it was changed to read: "Congress shall make no law establishing religion \* \* \*"<sup>88</sup>

It is quite clear from the record that the Senate was not satisfied with the draft received from the House, and on September 3, it rejected several other proposed drafts of the Amendment.<sup>89</sup> The wording of the drafts proposed and their rejection show that the Senate was not satisfied with any proposal which merely prevented an advantage to any one denomination or sect over others, as far as Church-State separation was concerned. It wished to go further. Provisions against laws establishing "one religious sect or society in preference to others" or "any religious sect or society" or "any particular denomination of religion in preference to another" appear to have been regarded as not broad enough to prohibit government appropriations to any or all religious sects or societies. The Senate clearly intended to prohibit any government aid to religious sects or

<sup>87</sup> Annals of Congress, Vol. I, pp. 729-731. This is the same as the wording of the amendment requested by the New Hampshire ratifying convention. See note 79: New Hampshire then had an establishment of religion (see note 80), and the purpose of its proposed amendment probably was to leave the subject of religion entirely to the states.

<sup>88</sup> Annals of Congress, Vol. I, p. 766. The language of the amendment as received in the Senate on August 25, 1789, was: "Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed." Journal of the First Session of the Senate, p. 63; *Murdock v. Pennsylvania* (1943), 319 U. S. 105, 124, note 6.

<sup>89</sup> On that day, the Senate passed a motion to strike out the words "nor shall the rights of conscience be infringed," but it rejected the following drafts of the amendment: "Congress shall make no law establishing one religious sect or society in preference to others." (This draft was the result of a motion to strike out the words "religion, or prohibiting the free exercise thereof," and insert the words "one religious sect or society in preference to others.") "Congress shall not make any law \* \* \* establishing any religious sect or society." "Congress shall make no law establishing any particular denomination of religion in preference to another \* \* \*." Journal of the First Session of the Senate, p. 70.

societies, whether discriminatory or not. Its intention was not merely to prohibit the government from setting up or establishing a religious sect or society, but also to prohibit government aid "to any or all religious faiths or sects in the dissemination of their doctrines", and participation "in the affairs of any religious organizations or groups."<sup>90</sup> This objective of the Senate was similar to the objective accomplished in Virginia as a result of the unwillingness of Jefferson, Madison and others, in the fight against Henry's assessment bill, to substitute multiple establishment of sects as a substitute for the old single establishment.

On September 9, the Senate approved the following wording of the Amendment: "Congress shall make no law establishing articles of faith or a mode of worship,<sup>91</sup> or prohibiting the free exercise of religion \* \* \*."<sup>92</sup> This substitution by the Senate of the words "articles of faith or a mode of worship", for the word "religion" in the draft received from the House,<sup>93</sup> indicates that the Senate agreed with Madison's belief that "the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform."<sup>94</sup>

<sup>90</sup> *McCullum v. Bd. of Ed.*, 333 U. S. 203, 211; *Everson v. Bd. of Ed.*, 330 U. S. 1, 16.

<sup>91</sup> This Court has said that the First Amendment was intended "to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect." *Davis v. Beason* (1889), 133 U. S. 342. It forbids a State "to aid religious groups to spread their faith." It prohibits "aid" to "any or all religious faiths or sects in the dissemination of their doctrines." *McCullum v. Bd. of Ed.*, 333 U. S. 203, 210, 211.

<sup>92</sup> Journal of the First Session of the Senate, p. 77; *Murdock v. Pennsylvania*, 319 U. S. 105, 124, note 6.

<sup>93</sup> It should be kept in mind that Madison's draft had been rejected in the House, and Livermore's draft had been substituted for it. Their objectives were different. Madison wanted to deny Congress power to make "an establishment" of any or all sects; while Livermore desired to deprive Congress of power either to establish or disestablish any or all sects in order to protect the existing Protestant establishment in New Hampshire.

<sup>94</sup> See note 86.

On September 21 a Senate-House conference committee was appointed,<sup>95</sup> and it substituted the words "respecting an establishment of religion" for the words "establishing articles of faith or a mode of worship."<sup>96</sup> The word "establishing" thus became "an establishment of", and the word "religion" could then be safely restored, and the amendment became a prohibition against "any law respecting an establishment of religion", not religion itself. This is significant when it is realized that the House rejected Livermore's draft, which prohibited "laws touching religion", and that the Senate rejected the draft received from the House, which prohibited "any law establishing religion." A contention that government recognition of God is prohibited by the First Amendment, or that separation of government and non-sectarian religion is required by it, completely ignores the fact that the draft of the amendment approved by the House and sent to the Senate, which prohibited "any law establishing religion", was changed to its final form, which prohibits "any law respecting an establishment of religion." It ignores, too, the fact that the First Amendment prohibits "any law respecting an establishment of religion", not "any law respecting religion." Had it been the intent of the First Amendment to prohibit all connection between government and religion, it would have prohibited "any law respecting religion", not merely "any law respecting an establishment of religion." The final draft of the amendment preserved intact the meaning which Madison had so clearly ascribed to his draft of it in the debates in the House and the meaning which the Senate had expressed in its draft.

<sup>95</sup> Journal of the Senate, p. 84.

<sup>96</sup> The House approved the conference committee's draft on Sept. 24 (Annals of Congress, Vol. I, p. 913), and the Senate approved it on Sept. 25 (Id., p. 88).

The multitude of our government subventions to religion is an important circumstance to be considered in the interpretation of the First Amendment.<sup>97</sup> Particularly important are the actions of the First Congress in this respect.<sup>98</sup>

On September 24, 1789, the day that the First Congress adopted its resolution submitting the First Amendment to the states for ratification, it adopted a resolution requesting the President to recommend to the people of the United States "a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity to establish a Constitution of government for their safety and happiness."<sup>99</sup>

The First Congress adopted a resolution providing for a chaplain for each house,<sup>100</sup> and an act for the raising of a

<sup>97</sup> Harvard Law Review, Volume 62, p. 1306, article by Arthur E. Southerland, Jr., entitled "Due Process and Disestablishment."

<sup>98</sup> "We are to place ourselves as nearly as possible in the condition of the men who framed that instrument." **Ex parte Bain** (1887), 121 U. S. 1, 12. "It was the Congress that launched the Government. It was the Congress that rounded out the Constitution itself by the proposing of the first ten amendments which had in effect been promised to the people as a consideration for the ratification. It was the Congress in which Mr. Madison, one of the first in the framing of the Constitution, led also in the organization of the government under it. It was a Congress whose constitutional decisions have always been regarded as they should be regarded as of the greatest weight in the interpretation of that fundamental instrument." **Myers v. United States** (1926), 272 U. S. 52, 174; **Patton v. United States** (1929), 281 U. S. 276, 300; **Ex parte Richard Quirin** (1942), 317 U. S. 1, 41.

<sup>99</sup> Annals of Congress, Vol. I, pp. 914, 915. The resolution was adopted in spite of the fact that Thomas T. Tucker, of South Carolina, argued "it is a business with which Congress has nothing to do; it is a religious matter, and as such is prescribed to us." Charles Warren, *Odd Byways in American History*, p. 222; Stokes, Vol. I, p. 487. Washington issued a proclamation in which he said "it is the duty of nations to acknowledge the providence of Almighty God." Stokes, Vol. I, p. 487.

<sup>100</sup> Annals of Congress, p. 932. James Madison was a member of the Congressional Committee which planned the Chaplain system of Congress. Reports of Committees, House of Representatives, Vol. II, p. 124.



regiment of troops, which provided for the appointment and pay of a chaplain.<sup>101</sup>

Under the Judiciary Act of 1789, passed by the First Congress, witnesses were disqualified who did "not believe that there is a God who rewards truth, and avenges falsehood," which continued in effect until 1906, when an amendment was adopted providing that the qualifications of witnesses are to be determined by the laws of the state in which the court sits.<sup>102</sup>

The members of the First Congress understood, if any one did, the true purport of the First Amendment, and the proceedings of that Congress display a definite intent that government promulgation of non-sectarian religion should not be disestablished by the Amendment.

#### Point IV.

**The first amendment and the principle of separation of church and state have never been construed to require disestablishment of all relations between government and religion.**

The "establishment of religion" and "free exercise of religion" clauses of the First Amendment, like the freedom of

<sup>101</sup> Act of March 3, 1791, 1st Congress, 3rd Sess., 1 Stat. 222. "If this had been a violation of the constitution—an establishment of religion—why was not its character seen by the great and good men who were coeval with the government? \* \* \* They, if anyone did, understood the true purport of the amendment \* \* \* they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistical apathy. \* \* \* On the contrary, all had been done with a continual appeal to the Supreme Ruler of the world and an habitual reliance upon His protection of the righteous cause which they commended to His care." Reports of Committees of the Senate, 32nd Cong., 2nd Sess., 1852-1853; Senate Report No. 376, Jan. 19, 1853. Also see Report No. 124, House of Representatives, 33rd Congress, 1st sess., Mar. 27, 1854.

<sup>102</sup> See account of this in Stokes, Vol. III, p. 146, Cf. with statement in Washington's Farewell Address. Note 30.

speech or freedom of the press clauses, are subject to exceptions. There was no intention to disregard the exceptions which have from time immemorial been treated as not within their purview, and which are not within their spirit.<sup>103</sup>

The religious clauses of the First Amendment and the principle of separation of church and state have never been construed to abrogate all relations between government and religion. In fact, this Court has based some of its decisions on the premise that there is a connection between religion and government.<sup>104</sup>

In applying the principle of separation of church and state, care must be exercised not to apply it in such a manner as to prohibit legislation which is not related to the reasons which brought the doctrine into existence.<sup>105</sup>

The words "absolute and complete separation of govern-

<sup>103</sup> "There was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (Art. I) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; \* \* \*"  
**Robertson v. Baldwin** (1897), 165 U. S. 275, 281, 282. Such exceptions, although within the letter, are not "within the spirit" of the amendment. *Id.*, p. 281; *Cf. Church of the Holy Trinity v. United States* (1892), 143 U. S. 457, 472.

<sup>104</sup> "It (polygamy) is contrary to the spirit of Christianity, and of the civilization which Christianity has produced in the Western world." **Church of Jesus Christ of Latter Day Saints v. United States** (1889), 136 U. S. 1, 49; **Davis v. Beason** (1889), 133 U. S. 333, 341.

<sup>105</sup> "A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence." **Snyder v. Massachusetts** (1933), 291 U. S. 97, 114. "The dangers of a delusive exactness in the application of the Fourteenth Amendment have been adverted to before now \* \* \* Delusive exactness is a source of fallacy throughout the law." **Truax v. Corrigan** (1921), 257 U. S. 312, 342 (Dissenting opinion of Mr. Justice Holmes). "Mere formulation of a relevant Constitutional principle is the beginning of the solution of a problem, not its answer." **McCullum v. Bd. of Ed.**, 333 U. S. 203, 212 (Mr. Justice Frankfurter's concurring opinion).

ment and religion" or "absolute and complete secularization of the public schools" cannot be substituted for the language of the First Amendment. To paraphrase the language used by Mr. Justice Black in a case decided in 1945, "they were not chosen by those who wrote the" First Amendment or "Fourteenth Amendment as a measuring rod for this Court to use in invalidating State or Federal laws passed by elected legislative representatives."<sup>106</sup>

Applying the principle that "most of the distinctions in the law are distinctions of degree,"<sup>107</sup> in prescribing the limits of State fostering of religion, there would seem to be some degree to which New Jersey can preserve the American tradition associating religion with education.

Congressional, army and navy chaplains, chapels at West Point and Annapolis, Congressional exemption of churches from taxation,<sup>108</sup> Bible reading in the schools in the District of Columbia,<sup>109</sup> requirement that the superintendent of the National Training School for Boys employ such methods as will "secure in them fixed habits of religion,"<sup>110</sup> expenditure

<sup>106</sup> *International Shoe Co. v. Washington* (1945), 326 U. S. 310, 325.

<sup>107</sup> "In those days (Marshall's) it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the States had any power, it was assumed that they had all power, and that the necessary alternative was to deny it altogether." *Panhandle Oil Co. v. Knox* (1928), 277 U. S. 218, 223 (dissenting opinion of Mr. Justice Holmes). A federal taxpayer's suit to prevent payment of salaries to chaplains of the Senate, House of Representatives, Army and Navy, was dismissed. *Elliott v. White* (1928), 23 F. 2d 997. The refusal to recognize the taxpayer's action is essentially a ruling of *de minimus*. *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U. S. 680, 692.

<sup>108</sup> D. C. Code, sections 47-801, 43-1533 (1940). *Gibbons v. District of Columbia* (1886), 116 U. S. 404, 407. "An exemption from taxation is in the nature of an appropriation of public funds, because, to the extent of the exemption, it becomes necessary to increase the rate of taxation upon other properties in order to raise money for the support of government." *Mass. Gen. Hospital v. Belmont*, 233 Mass. 190, 203, 124 N. E. 21, 25.

<sup>109</sup> By-laws of Dist. of Columbia Bd. of Ed., 1926, Chap. 6, Sec. 4.

<sup>110</sup> D. C. Code, Sec. 32-811 (1940).



of public funds for education and training of young men for the clergy;<sup>111</sup> Federal expenditures toward the construction of or additions to denominational hospitals,<sup>112</sup> motto "In God We Trust" on our coins,<sup>113</sup> and a multitude of other governmental subventions to religion,<sup>114</sup> being a continuous practical construction given to the First Amendment by legislation, are highly persuasive that the authors of the Amendment had no intention to abrogate all relation between government and religion.

*Reynolds v. United States*<sup>115</sup> and *Davis v. Beason*<sup>116</sup> establish the principle that the religious liberty secured by the "free exercise" of religion clause of the First Amendment is subject to the inherent authority of Congress (and under the Fourteenth Amendment and later decisions, the states) to legislate within the limits of the police power for the general welfare.<sup>117</sup> Thus the right to "free exercise" of religion, unqualified and absolute in the language of the First Amendment, is "subordinate" to laws prohibiting actions "regarded by general consent" as "inimical" to society, and such laws "enforce an outward conformity to a pre-

<sup>111</sup> Under G. I. Bill of Rights, 58 Stat. 289.

<sup>112</sup> 60 Stat. 1041.

<sup>113</sup> Act of Mar. 3, 1865; 13 Stat. 513. In 1907 the motto was left off some new coins; Stokes, Vol. III, p. 603. The protest was so great that Congress made its inscription on the coins mandatory. Act May 18, 1908; 35 Stat. 164.

<sup>114</sup> To list all the Federal and State recognitions, or subsidies to religion would be an endless task.

<sup>115</sup> 98 U. S. 145.

<sup>116</sup> 133 U. S. 333.

<sup>117</sup> Religious liberty does not justify one in refusing to bear arms or in doing acts which violate the child labor laws or which constitute a breach of the peace. In *re Summers* (1945), 325 U. S. 561; *Prince v. Massachusetts* (1944), 321 U. S. 158; *Chapinsky v. New Hampshire* (1942), 315 U. S. 568.



scribed" standard<sup>118</sup> with respect to an "important feature of social life."<sup>119</sup>

*Bradfield v. Roberts*<sup>120</sup> was the first case in which a direct issue was sought to be raised under the "establishment of religion" prohibition. The case involved an appropriation to erect certain additions to a hospital, and this Court held that it was not material that the hospital was conducted under the auspices of the Roman Catholic Church.<sup>121</sup>

*Quick Bear v. Leupp*<sup>122</sup> involved the payment by the Federal Government to Indians of the Sioux tribe of their own funds (held in trust) for the education of Indians in Catholic schools of their own choice. This Court, while stating that "the government is necessarily undenominational," rejected the argument of counsel that the government cannot act in a sectarian capacity with respect to trust funds.<sup>123</sup>

In *Arver v. United States*,<sup>124</sup> the statute involved was the Selective Draft Act of 1917, and this Court summarily rejected the contention that the exemption of certain classes

<sup>118</sup> *Davis v. Beason*, 133 U. S. 333, 342.

<sup>119</sup> *Reynolds v. United States*, 98 U. S. 145, 165.

<sup>120</sup> 175 U. S. 291 (1899).

<sup>121</sup> *Id.*, at 298. Immediately after this case arose Congress enacted a statute declaring it to be "the policy of the government of the United States to make no appropriation of money or property for the purpose of founding, maintaining or aiding by payment for services, expenses, or otherwise, any church or religious denomination, or any institution or society which is under sectarian or ecclesiastical control. 29 Stat. 411 (1896).

<sup>122</sup> 210 U. S. 50 (1908).

<sup>123</sup> Referring to the statute quoted in note 121, this Court quoted with approval the declaration of the Court of Appeals that "it seems inconceivable that Congress shall have intended to prohibit them from receiving religious education at their own cost if they desire it; such an intent would be one to prohibit the free exercise of religion among the Indians." *Id.*, at 82. It seems indisputable that the Government acted in a denominational or sectarian capacity, even though as a trustee, to aid the Indians in the free exercise of religion.

<sup>124</sup> 245 U. S. 366 (1918).

of persons by reason of their religious calling or belief rendered it unconstitutional.<sup>125</sup>

By this Court's decision in *Pierce v. Society of Sisters of Holy Name*,<sup>126</sup> it is now settled that compulsory school attendance laws must permit attendance at sectarian schools which meet public school standards.<sup>127</sup>

In *Cochran v. State Bd. of Education*,<sup>128</sup> the furnishing of text books to children attending sectarian schools was sustained, and in *Everson v. Board of Education*,<sup>129</sup> the furnishing of transportation to children attending such schools was sustained.<sup>130</sup>

In *Saia v. New York*,<sup>131</sup> this court held that a municipality had improperly refused to permit a member of a religious sect to use a tax-established and tax-supported public park for the purpose of lecturing on religious subjects.

These cases fully demonstrate the fact that the First Amendment does not abrogate all relations between religion and government, nor completely isolate each from the other.

<sup>125</sup> "We pass without anything but statement the proposition, that an establishment of religion or an interference with the free exercise thereof, repugnant to the First Amendment, resulted from the exemption clauses of the act \* \* \*." *Id.* at 390.

<sup>126</sup> 268 U. S. 510 (1925).

<sup>127</sup> Thus the children are aided in the free exercise of religion. "It is an inevitable implication of the case that compulsory school laws which permit attendance at parochial schools are constitutional, notwithstanding the compulsion which is thereby lent such schools in 'recruiting' pupils." Corwin, *A Constitution of Powers In A Secular State*, p. 115.

<sup>128</sup> 281 U. S. 370 (1930).

<sup>129</sup> 330 U. S. 1 (1947).

<sup>130</sup> "It is undoubtedly true that children are helped to get to church schools." *Id.*, p. 17.

<sup>131</sup> 334 U. S. 558 (1948).

## Point V.

The first amendment, as made applicable to the states by the Fourteenth Amendment, does not disestablish Bible reading and the repeating of the Lord's Prayer in the public schools.

The Bible is not an intruder in the public schools. Whether or not one is afflicted with "emotional astigmatism,"<sup>132</sup> it would be impossible for him, or anyone else, not to see that the Bible has been in the public schools since the earliest days of our history.<sup>133</sup>

We do not believe it is "emotional astigmatism" which causes us to reject the view that the Bible is "a monument over the grave of Christianity" and that it has reached the "end of its literary influence."<sup>134</sup>

No one who is familiar with the historical significance of the First Amendment and the full meaning of the principle of separation of Church and State can controvert the conclusion reached by Mr. Justice Frankfurter in his concurring opinion in *McCullum v. Board of Education*<sup>135</sup> that

<sup>132</sup> Appellants' brief, p. 11. They state that Appellees' briefs in the State Court, and the opinion of the State Court "evinces such an emotional reaction." Brief, pp. 11, 12.

<sup>133</sup> Dr. Benjamin Rush, one of the signers of the Declaration of Independence, urged the reading of the Bible in the public schools and stressed not only its moral and religious character but its possession of the very soul of democracy—equality of men, respect for just laws, and the essential virtues. Moehlman, *School and Church*, p. 65; Stokes, Vol. 2, p. 49.

<sup>134</sup> Appellants say this case is not an assault on the Bible (Brief, p. 12), but they include the following quotation in their brief: "Those who talk of the Bible as a 'monument of English prose' are merely admiring it as a monument over the grave of Christianity. . . . And the fact that men of letters now discuss it as 'literature' probably indicates the end of its 'literary' influence." Appellants' brief, p. 21.

<sup>135</sup> 333 U. S. 203, 212 (1948). Three other justices joined in the opinion.

the Constitution prohibits "the commingling of sectarian with secular instruction in the public schools,"<sup>136</sup> as exemplified by the sectarian classes banned by the Court in that case.<sup>137</sup> "The candid purpose" of those classes was "sectarian teaching."<sup>138</sup>

Mr. Justice Frankfurter "considered the relevant history of religious education in America,"<sup>139</sup> and reached the following conclusions:

"The modern public school derived from a philosophy of freedom reflected in the First Amendment. \* \* \*<sup>140</sup> long before the Fourteenth Amendment subjected the States to new limitations, the prohibition of furtherance by the State of religious (sectarian)<sup>141</sup> instruction became the guiding principle, in law and feeling, of the American people. \* \* \*

"Separation in the field of education, then, was not imposed upon unwilling States by force of superior law. In this respect the Fourteenth Amendment merely reflected a principle then dominant in our national life. To the extent that the Constitution thus made it bind-

<sup>136</sup> "Illinois has here authorized the commingling of sectarian with secular instruction in the public schools. The Constitution of the United States forbids this." *Id.*, p. 212. He refers again to the "Prohibition of the commingling of sectarian and secular instruction in the public schools \* \* \*." *Id.*, p. 220.

<sup>137</sup> We have referred to the Court's opinion, written by Mr. Justice Black, in an earlier part of this brief.

<sup>138</sup> *Id.*, p. 226.

<sup>139</sup> *Id.*, p. 213.

<sup>140</sup> *Id.*, p. 214.

<sup>141</sup> We feel justified in suggesting that the word "sectarian" should be here substituted for the word "religious," in view of two similar substitutions made in the opinion at pages 212 and 220 (see note 37), and in view of the relevant history reviewed in the opinion.



ing upon the States, the basis of the restriction is the whole experience of our people."<sup>142</sup>

Mr. Justice Frankfurter, in his review of the relevant history of religious education says that "in Massachusetts largely through the efforts of Horace Mann, all sectarian teachings were barred from the common school to save it from being rent by denominational conflict."<sup>143</sup>

In 1826 Massachusetts adopted a statute requiring the daily reading of the Bible in the public schools.<sup>144</sup> In 1866 the Massachusetts Court sustained the reading of the Bible in the schools.<sup>145</sup>

Under the leadership of Horace Mann, the greatest of American public school exponents, the public school system of Massachusetts by 1855 had eliminated sectarian instruction.<sup>146</sup> He took a firm stand, however, against purely secular education and in favor of Bible reading in the schools.

"Horace Mann was opposed to sectarian doctrinal instruction in the schools, but he repeatedly urged the teaching of the elements of religion common to all the Christian sects. He took a firm stand against the idea of a purely secular education, \* \* \*. Lest his name should go down in history as that of one who had at-

<sup>142</sup> Id., p. 215. "Separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally." Id., p. 227.

<sup>143</sup> Id., p. 215. "In New York, the rise of the common schools led, despite fierce sectarian opposition, to the barring of tax funds to church schools, and later to any school in which sectarian doctrine was taught." Id., p. 214.

<sup>144</sup> Laws of 1927, Chap. 71, Sec. 31. Originally enacted in 1826. Church-State Relationships In The United States, Johnson, p. 26.

<sup>145</sup> *Spiller v. Woburn* (1866), 94 Mass. 127.

<sup>146</sup> Sherman M. Smith, the Relations of the State to Religious Education in Massachusetts, p. 142; Stokes, Vol. II, p. 54.

tempted to drive religious instruction from the schools, he devoted several pages in his final report—the twelfth—to a statement in which he denied the charges of his enemies.”<sup>147</sup>

In his final report in 1848, Horace Mann said:

“I believed then (1837), as now, that sectarian books and sectarian instruction, if their encroachment were not resisted, would prove the overthrow of the schools.

“I believed then, as now, that religious instruction in our schools, to the extent which the Constitution and the laws of the State allowed and prescribed, was indispensable to their highest welfare, and essential to the vitality of moral education.

“I avail myself of this, the last opportunity which I may ever have, to say in regard to all affirmations or intimations that I have ever attempted to exclude religious instruction from the schools, or to exclude the Bible from the schools, or to impair the force of that volume, that they are now, and always have been, without substance or semblance of truth.

“Our system earnestly inculcates all Christian morals; it founds its morals on the basis of religion; it welcomes the religion of the Bible; and in receiving the Bible, it allows it to do what it is allowed to do in no other system, to speak for itself.”<sup>148</sup>

<sup>147</sup> Raymond B. Culver, *Horace Mann and Religion In The Massachusetts Public Schools* (1929), p. 235. In his eleventh annual report, Horace Mann said: “... I suppose there is not, at the present time, a single town in the Commonwealth in whose schools it is not read. Whoever, therefore, believes in the Sacred Scriptures, has his belief, in form and in spirit, in the schools, and his children read and hear the words themselves which contain it.” Smith, p. 175; Stokes, Vol. II, 56.

<sup>148</sup> Horace Mann, *Annual Reports*, (Boston, 1891), Vol. IV, p. 308; Stokes, Vol. II, p. 57. The Constitution of Massachusetts prohibits the use of public funds for the support of any school, “under public control or otherwise, wherein any religious or sectarian doctrine is taught.”

Today the Bible is read in all the public schools in Massachusetts.<sup>149</sup>

Continuing his review of history, in the *McCullum* case, Mr. Justice Frankfurter mentions President Grant's famous remarks in 1875 to the Convention of the Army of the Tennessee,<sup>150</sup> and points out that Grant's conviction regarding separation of church and state was so great that he urged an amendment to the Constitution,<sup>151</sup> and that shortly thereafter, in 1876, the Blaine Amendment was introduced in Congress.<sup>152</sup> Sponsored and supported by a President and members of Congress who were the most ardent advocates of the principle of separation of church and state in our history, having the most deeply rooted convictions regarding that principle at a period when it "was firmly established in the consciousness of the nation"<sup>153</sup> and "dominant in our national life,"<sup>154</sup> the Blaine Amendment is significant in its provision that the Bible shall not be excluded from the public schools:

<sup>149</sup> Johnson, p. 301.

<sup>150</sup> 333 U. S. 203, 218. Grant opposed appropriations "to the support of any **sectarian** schools" and any schools "other than those sufficient to afford every child growing up in the land the opportunity of a good common school education, unmixed with **sectarian**, pagan, or atheistical dogmas," and added: "Leave the matter of religion to the family altar, the church, and the private school, supported entirely by private contributions. Keep the church and the state forever separate." 333 U. S. 203, 218. He used the words "religion" and "church" to mean "sectarianism."

<sup>151</sup> *Id.*, p. 218.

<sup>152</sup> The House passed the Blaine Amendment by the overwhelming vote of 180 to 7, and it lacked by two votes the necessary two-third majority which would have resulted in its submission to the states. See Article on Blaine Amendment in *Harvard Law Review*, Vol. 64, p. 939, at pp. 942, 943.

<sup>153</sup> 333 U. S. 203, 217.

<sup>154</sup> *Id.*, p. 215.

"This article shall not be construed to prohibit the reading of the Bible in any school or institution."<sup>155</sup>

It is significant too that "every state admitted into the Union since 1876 was compelled by Congress to write into its constitution a requirement that it maintain a school system free from *sectarian* control."<sup>156</sup>

In the Spring of 1944, the American Council on Education, with the cooperation of the National Conference of Christians and Jews assembled a group of educators at Princeton, to discuss the relation of religion to public education. The conference included representatives of education, under both public and private auspices, and leaders of the Catholic, Protestant and Jewish faiths. Following that meeting the American Council created the Committee on Religion and Education. After extensive study of the relation of religion and education the Committee made its first report, in which it said:

"We reject secularism as a philosophy of life and we cannot agree that it has ever been accepted as such by the American people.

"\* \* \* The fact that our population is religiously heterogeneous puts the separation of church and state, as a broad political principle, beyond debate, regardless of

<sup>155</sup> Id., p. 218, note 6. Elihu Root, mentioned by Mr. Justice Frankfurter, firmly believed in "maintaining the great American principle of eternal separation between Church and State" (Id., p. 219), but he saw no objection to prayer for divine guidance as part of State transactions and exercises. "State constitutional conventions are also generally opened with prayer. In 1915, in New York, when the expected chaplain failed to appear, the presiding officer, the Honorable Elihu Root (1845-1937), though a layman, led the assembly in a simple but earnest and appropriate prayer for divine guidance." Stokes, Vol. III, p. 141.



what theories may be held concerning what would be appropriate in a different kind of society.

\* \* \* \* \*

"The assumption that a school system from which all study of religion should be excluded was what the American people really wanted when they secularized education runs counter not only to our educational, but to our religious history. \* \* \* Our purpose here is to correct the impression that the divorce of education from religion was what was desired when *sectarian* teaching was banished from the schools.

\* \* \* \* \*

"\* \* \* Underneath the cleavage between Catholic and Protestant, between Christian and Jew, is the stream of the Judaeo-Christian tradition with its conception of the common source and spiritual equality of all men as the children of God; the obligation to respect the supreme worth of persons and the wickedness of exploiting them; the golden quality of mercy; the meaning of redemptive love; the inexorableness of the law that he that soweth the wind shall reap the whirlwind. These are great cohesive spiritual forces to which the secular order of society probably owes more than it suspects.

\* \* \* \* \*

"\* \* \* Holding to the principle of the separation of church and state in America, we nevertheless deplore what we consider a strained application of that principle in our school system. We are unable to believe that a school which accepts responsibility for bringing its students into full possession of their cultural heritage can be considered to have performed its task if it

leaves them without a knowledge of the role of religion in our history, its relation to other phases of the culture, and the ways in which the religious life of the American community is expressed."<sup>157</sup>

Other outstanding educators have expressed similar views.

Dr. Nicholas Murray Butler says:

"The separation of church and state is fundamental in our American political order, but so far as religious instruction is concerned, this principle has been so far departed from as to put the whole force and influence of the tax-supported school on the side of one element of the population, namely, that which is pagan and believes in no religion whatsoever."<sup>158</sup>

Dr. Lüther A. Weigle, Dean of Yale Divinity School, said:

"There is nothing in the principle of religious freedom or the separation of church and state to hinder the school's acknowledgment of the power and goodness of God. \* \* \* We must keep sectarianism out of our public schools. But that does not necessitate stripping the schools of religion. To exclude religion from the public schools would be to surrender these schools to the sectarianism of atheism or irreligion."<sup>159</sup>

<sup>157</sup> *The Relation of Religion to Public Education, the Basic Principles* (Washington, 1947). Committee on Religion and Education, American Council on Education, pp. 1, 2, 8, 9, 47, 49, 50; printed as an appendix in *Religion's Place in General Education*, Nevin C. Harner (Richmond, 1949), p. 89, at pp. 98, 99, 107, 159, 162.

<sup>158</sup> *Religion's Place in General Education*, Nevin C. Harner, p. 42.

<sup>159</sup> *Id.*

Dr. Alexander Meiklejohn, President of Amherst College, 1912-1924, Professor of Philosophy and Chairman of the Experimental College, University of Wisconsin, 1926-1938, says:

"\* \* \* In whatever varied ways are available, the general welfare requires that our young people learn the lessons which we call 'spiritual.'"

"\* \* \* My own beliefs are definitely on the side of nonreligion. So far as I can see, human purposes have no extra-human backing. Yet, so long as half our people, more or less, are interpreting and conducting their lives, their family relationships, the upbringing of their children upon a basis of some religious belief, the Constitution requires of us that those beliefs shall be given not only equal status but also positive status in the public planning of education. \* \* \* 160

Since this Court said, more than 100 years ago, that the Bible is not a sectarian book,<sup>161</sup> a long line of State court decisions, cited in Appellees' briefs, have sustained the reading of the Bible in the public schools.<sup>162</sup>

<sup>160</sup> Law and Contemporary Problems, Duke University School of Law, Vol. 14, No. 1 (1949), p. 67.

<sup>161</sup> *Vidal v. Girard Executors* (1844), 2 Howard 127, 11 L. Ed. 205, 235.

<sup>162</sup> Twelve states and the District of Columbia require Bible reading in the public schools. Twenty-five other states permit it. Only eight states have no Bible reading in the public schools. *The State and Sectarian Education*, N. E. A. Research Bulletin (Oct., 1946), p. 38; Stokes, Vol. II, p. 551. It is required by rule of the New York City Board of Education. Stokes, Vol. II, p. 553. Many of the states in which Bible reading in the schools is permitted, by court decision or rule of the education authorities, have no statute on the subject. No state has a statute specifically prohibiting public school Bible reading. Gavel, Public Funds for Church and Private Schools (Washington, 1937), p. 553; Stokes, Vol. II, p. 551. One state (Mississippi) has a constitutional provision to the effect that the Bible shall not be excluded from the public schools. Thorpe, Federal and State Constitutions, Vol. IV, p. 2092.

The few state court decisions which are adverse to Bible reading in the schools involve compulsory Bible reading<sup>163</sup> or use of the Bible to impart sectarian instruction.<sup>164</sup> The fallacy in all of them is exemplified by *Ring v. Board of Education*,<sup>165</sup> which holds that the Bible is a sectarian book, but states that it would be impossible to lay down any rule "to determine whether any particular part of the Bible forms the basis of or supports a sectarian doctrine."<sup>166</sup>

The Louisiana Court, in *Herald v. Parish Board*,<sup>167</sup> states that this is a "Godly land" and "we are a religious people,"<sup>168</sup> that Catholic children are not prohibited by their church "from reading the Bible without authoritative comment,"<sup>169</sup> that neither Catholic, Protestant or Jew can object to the reading of the Old Testament. The court also says that a Christian, either Catholic or Protestant, can have no objection to the repeating of the Lord's Prayer in the public schools. Nowhere in the opinion does the court say that a Jew can object to such repeating of that prayer, nor can it be successfully demonstrated that any one who believes in God can have any objection to that Prayer. As pointed out by the Court below (R. 35) that prayer is "based upon the ancient Jewish prayer called 'The Kaddish'—

<sup>163</sup> *Finger v. Weedman* (South Dakota Sup. Ct., 1929), 226 N. W. 348; *Ring v. Bd. of Ed.* (1910), 245 Illinois 334, 92 N. E. 251.

<sup>164</sup> *Freeman v. Scheve*, 65 Neb. 853, 91 N. W. 846, 65 Neb. 876, 93 N. W. 169.

<sup>165</sup> 245 Illinois 334, 92 N. E. 251.

<sup>166</sup> The dissenting judges said: "To hold that the Bible cannot be read in the public schools requires a judicial determination that it teaches the doctrine of some sect, and if that is so we ought to be able to say what sect." 92 N. E. 258.

<sup>167</sup> 136 La. 1034, 68 So. 116.

<sup>168</sup> *Id.*, p. 119.

<sup>169</sup> *Id.*, p. 118.



'Exalted and hallowed be the name of God throughout the world \* \* \* May His Kingdom come, His will be done.' <sup>170</sup>

The Bible has been in the public schools from the earliest days of our history, and our Presidents and other public officials have frequently urged our citizens to read it. <sup>171</sup> The reading of the Bible and repeating of the Lord's Prayer in the opening exercises of the public schools does not "destroy or weaken or affect the cleavage between church and state"; it "does not bridge or conjoin the two." <sup>172</sup>

"The Bible has long been in our common schools. \* \* \* It was placed there as the book best adapted from which to 'teach children and youth the principles of piety, justice, and a sacred regard to truth, love to their country, humanity, and a universal benevolence, sobriety, moderation and temperance. \* \* \*' But, in doing this, *no scholar is requested to believe it, none to receive it as the only true version of the laws of God. The teacher enters into no argument to prove its correctness, and gives no instruction in theology from it. To read the Bible in school for these and like purposes.*

<sup>170</sup> "It is significant that at the great Congress of Religions at the World's Fair in Chicago, Christians, Jews, Mohammedans and other groups agreed to open their conferences with the Lord's Prayer." Stokes, Vol. II, p. 552.

<sup>171</sup> President Franklin D. Roosevelt's Thanksgiving Day Proclamation in 1944: "To the end that we may bear more earnest witness to our gratitude to Almighty God, I suggest a nation-wide reading of the Holy Scriptures during the period from Thanksgiving Day to Christmas. Let every man of every creed go to his own version of the Scriptures for a renewed and strengthening contact with those eternal truths and majestic principles which have inspired such measure of true greatness as this nation has achieved." N. Y. Times, Nov. 4, 1944; Stokes, Vol. II, p. 789.

<sup>172</sup> *Lewis v. Bd. of Ed.* (1935), 285 N. Y. Supp. 164, 174, modified in other respects in 286 N. Y. Supp. 174, rehearing denied in 288 N. Y. Supp. 751, appeal dismissed in 276 N. Y. 490, 12 N. E. 2d 172 (N. Y. Court of Appeals, 1937).

or to require it to be read without sectarian explanations, is no interference with religious liberty." <sup>173</sup>

### Point VI.

**Appellants' rights of conscience or freedom of intellect have not been infringed.**

The First Amendment's prohibition against establishment of religion by Congress is not converted by the Fourteenth Amendment into a similar prohibition against State action except to prevent invasion of a citizen's religious liberty. Bible reading and the repeating of the Lord's Prayer in the public schools does not invade appellants' "liberty \* \* \* without due process of law", within the meaning of the Fourteenth Amendment, unless it deprives them of a liberty which is "implicit in the concept of ordered liberty" or which is "of the very essence of a scheme of ordered liberty." <sup>174</sup>

The precise question involved is whether Bible reading and the repeating of the Lord's Prayer in the public schools is an establishment of religion of such a nature as to deprive appellants of freedom of religion or freedom of intellect. <sup>175</sup>

<sup>173</sup> *Commonwealth, ex rel. Wall v. Cooke* (Mass., 1859), 7 Am. L. Reg. 417; *Lewis v. Bd. of Ed.* (1935), 285 N. Y. S. 164.

<sup>174</sup> *Adamson v. California* (1946), 332 U. S. 46, 54; *Palko v. Connecticut*, 302 U. S. 319, 325. "The notion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again, after impressive consideration." *Wolf v. Colorado* (1948), 338 U. S. 25, 26.

<sup>175</sup> "Is that kind of double jeopardy to which the statute subjected him a hardship so acute and shocking that our policy will not endure it? Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?'" *Palko v. Connecticut* (1937), 302 U. S. 319, 328. Cf. Edward S. Corwin, *Constitution of Powers in a Secular State*, pp. 114 and 116.

The reasoning which leads to the answer to that question "starts with the unquestioned premise that the Bill of Rights, when adopted, was for the protection of the individual against the federal government and its provisions were inapplicable to similar actions done by the states",<sup>176</sup> and it ends with the inevitable conclusion that Bible reading and the repeating of the Lord's Prayer in the public schools were not considered to be a violation of "the concept of ordered liberty", either before or at the time the First Amendment was made applicable to the states by the Fourteenth Amendment. In fact, Bible reading and the repeating of the Lord's Prayer in the public schools was then, long before, and is now, "firmly established in the consciousness of the nation."<sup>177</sup> The Fourteenth Amendment, "to the extent" that it made the First Amendment "binding upon the States,"<sup>178</sup> did not reflect "any principle then dominant in our national life" which would exclude Bible reading from the public schools. Bible reading in the public schools was then, and long before, "the whole experience of our people."<sup>179</sup>

Bible reading "from the very inception of this country has been an integral part of our school system" and "an integral part of the American tradition—a tradition which is now being threatened by a confused concept of religious liberty."<sup>180</sup>

<sup>176</sup> *Adamson v. California*, 332 U. S. 46, 51.

<sup>177</sup> *McCollum v. Bd. of Ed.*, 333 U. S. 203, 217, 218.

<sup>178</sup> *Id.*, p. 215. In the majority opinion, Mr. Justice Black says: "This case relates to the power of a state to utilize its tax-supported public school system in aid of religious instruction insofar as that power may be restricted by the First and Fourteenth Amendments to the Federal Constitution." *Id.*, pp. 204, 205.

<sup>179</sup> *Id.*, p. 215. See discussion of Blaine Amendment and other matters at notes 143-173.

<sup>180</sup> Catholic Action (published by National Catholic Welfare Conference, Feb., 1950), Another Tradition at Stake, George Reed, p. 4, at 5. Mr. Reed says that this "action is brought by taxpayers supported by the United Secularist League of America." *Id.*, p. 4.

The government of a heterogeneous people must necessarily use tax money to promote opinions and practices which are contrary to the beliefs, disbeliefs, or convictions of part of the population. Some taxpayer can be found who disbelieves opinions which are promoted by almost every subject included in the program of any public school.

The objection of a small group to the reading of the Bible in the Public Schools is not unlike the objection to the effect that some teachers of social studies are guilty of anti-capitalist indoctrination, or the objection of certain religious groups to the teaching of scientific facts which they deem to be contrary to their religion, or the objection of Jehovah's Witnesses to compulsory salute of our flag as part of a school program to foster the principles of Americanism, or the teaching of many other things in our public schools which are disbelieved by some of the students and their parents or which are contrary to their convictions.

There is no evidence or allegation that the appellants' rights of conscience have been violated or that they have been deprived of the right of "free exercise" of their religion or that the rights of conscience of Gloria Klein, daughter of the appellant, Anne E. Klein, and a student in the Hawthorne High School, have been violated or that she has been deprived of the right of "free exercise" of her religion. There is no evidence or allegation to the effect that the reading of the Bible or reciting of the Lord's prayer in the school are contrary to their religion or that they do not believe in God or the Bible.

Secularists demand, in effect, that the public schools ignore the part that religion plays in the lives of the large majority of Americans. The positive or negative denial of the supernatural in the public schools would be a negation of religion and to make such denial is a unilateral exercise of liberty. To call a belief in the supernatural a religion,



and a belief in naturalism a philosophy, and, on that basis, to exclude the one and embrace the other, is to prohibit the free exercise of religion and to establish negative religious dogmatism. Negative religious dogmatism in the public schools is as truly a denial of liberty as is positive religious (sectarian) dogmatism.

Religious people have every right to resent and oppose such an attack upon their religion made in the name of dogmatic secularism. A failure of the public schools to acquaint our children with the role of religion in American culture, while at the same time teaching them all other phases of the culture, is to be unneutral. Secularists and atheists could seek no better means to convert the public schools wholly to their dogmatic secularism (views, beliefs and non-beliefs) than the total banishment of religion from the schools. If they accomplish that, conscience and equality will be the right solely of those who oppose religion in the schools, and the "establishment of religion" or "free exercise" of religion clauses of the First Amendment, or the "privileges or immunities" or "due process of law" or "equal protection" clauses of the Fourteenth Amendment will have been used to establish dogmatic secularism, irreligion or non-religion.

The First and Fourteenth Amendments prohibit the establishment of dogmatic secularism, irreligion, non-religion, atheism, and philosophy, as certainly as they prohibit the establishment of dogmatic religion (sectarian religion). They prohibit any interference with the free exercise of religion as surely as they prohibit any interference with the free exercise of secularism, irreligion, non-religion, atheism, and philosophy. Their prohibition against any laws which "compel" persons "to conform" their "beliefs" and "views"<sup>181</sup> to dogmatic secularism, irreligion, non-religion:

<sup>181</sup> Davis v. Beason, 133 U. S. 333, 342.

atheism, and philosophy, is just as rigid as their prohibition against any laws which compel persons to conform their beliefs and views to dogmatic religion. Their command that no law shall "enforce an outward conformity to a prescribed standard"<sup>182</sup> set up by dogmatic secularism, irreligion, atheism, and philosophy, is not less strict than their command that no law shall enforce an outward conformity to a prescribed standard set up by dogmatic religion.

The "fixed star in our constitutional constellation" \* \* \* that no official, high or petty, can prescribe what shall be orthodox in" any "matters of opinion or force citizens to confess by word or act their faith therein"<sup>183</sup> is as applicable to dogmatic secularism, irreligion, non-religion, atheism, and philosophy, as it is to dogmatic (sectarian) religion.

A decision in favor of appellants would have to be predicated on the assumption that religious liberty has the same absolute quality as freedom to believe. Much confusion has arisen from the failure to distinguish "freedom of conscience" or "freedom of intellect or mind," from "religious liberty." Freedom of conscience, or freedom of intellect, is freedom to believe or disbelieve, and it is absolute. It cannot be restricted by law. The state cannot compel one to believe what he disbelieves or to disbelieve what he believes. On the other hand, religious liberty is freedom to act in accordance with one's belief or disbelief. It is not absolute, and it can be restricted by law.<sup>184</sup> It is relative, and its exercise is restricted by public welfare legislation

<sup>182</sup> Id.

<sup>183</sup> *West Virginia State Bd. of Ed. v. Barnette*, 319 U. S. 624, 642.

<sup>184</sup> "Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." *Cantwell v. Connecticut*, 310 U. S. 296, 303; *West Virginia State Bd. of Ed. v. Barnette*, 319 U. S. 624, 644; *Hamilton v. University of California*, 293 U. S. 245, 268.

and by the freedom of conscience or freedom of intellect of, and the equality of rights of, other citizens. A person has the right to believe in polygamy, but the First and Fourteenth Amendments do not prohibit a law forbidding him to practice it.<sup>185</sup>

Religious liberty, if it were absolute, would result in a denial of equality in the exercise of religious beliefs unless everyone had the same belief or acted uniformly. Equality in the exercise of religious beliefs, therefore, requires adjustment. Conscience and equality are not the right solely of any one group.

The New Jersey statute, as interpreted by the New Jersey Supreme Court and as applied by the Appellee Board of Education, contains no compulsive feature. No punishment or penalty is provided for, or has been imposed, for non-compliance. In fact, any student may be excused upon request. Neither the statute or resolution force any student "to confess by word or act their faith,"<sup>186</sup> in the Old Testament or the Lord's Prayer, and they do not "enforce an outward conformity to a prescribed standard."<sup>187</sup>

Permission granted to a pupil to be absent from the classroom during the reading of the Bible and the repeating of the Lord's Prayer is not, as contended by appellants,<sup>188</sup> an admission of discrimination. It is similar in every respect to an inauguration ceremony, pursuant to Article VI, Paragraph 3, of the Constitution, which provides for a religious inauguration ceremony but does not require it for those who desire to be excused from participation in a religious

<sup>185</sup> *Davis v. Beason*, 133 U. S. 333, 342, 343; *Reynolds v. United States*, 98 U. S. 145, 165.

<sup>186</sup> *West Virginia State Bd. of Ed. v. Barnette*, 319 U. S. 624, 630.

<sup>187</sup> *Davis v. Beason*, 133 U. S. 333, 342.

<sup>188</sup> Appellants' Brief, p. 31.

ceremony. The provision for an oath of office, accompanied by the right to be excused, is not an admission of discrimination, and neither is the permitted withdrawal from Bible reading and the repeating of the Lord's prayer in the schools.

In *McCullum v. Board of Education*,<sup>180</sup> Mr. Justice Jackson says that the "plaintiff, as she has every right to be, is an avowed atheist." How is that right to be protected and secured to the atheist in the public schools, in connection with the reading of the Bible, the Declaration of Independence and the preamble to the New Jersey Constitution, and the singing of the Star Spangled Banner? When the school children sing the national anthem, they stand at attention and in an attitude not only of respect and love of our country but in an attitude of reverence for God, who has "made and preserved us a nation." The answer is that the rights of conscience, or freedom to disbelieve, of an atheist should be protected in the same manner as were the rights of conscience of the children of the plaintiffs in the flag salute case (*West Virginia State Board v. Barnette*).<sup>190</sup> In that case the Court did not declare unconstitutional the school board resolution providing for the salute to the flag. It merely enjoined the school board from compelling the plaintiff's children to salute the flag.

Mr. Justice Black's opinion in *McCullum v. Board of Education*<sup>191</sup> did not base jurisdiction of the Court or the decision of the Court upon discrimination against, or embarrassment or humiliation of, the appellant's child, who was not attending the sectarian classes when the action was commenced. That decision was based entirely upon an un-

<sup>180</sup> 333 U. S. 203, 234.

<sup>190</sup> 319 U. S. 624.

<sup>191</sup> 333 U. S. 203.



constitutional utilization of the "public school system to aid religious groups to spread their faith" and "to aid any or all religious faiths or sects in the dissemination of their doctrines," and to afford "sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery." <sup>192</sup> Mr. Justice Frankfurter, in his concurring opinion, agreed that "the Champaign arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects." Continuing, he said that "Separation is a requirement to abstain from fusing functions of government and of religious sects."

The "divisiveness" theory exploited in the decisions of some of the state courts <sup>193</sup> should be given close scrutiny. That theory assumes that exercise of the right to be different puts a pupil in a class by himself, deprives him of equality with the other pupils, that he loses caste with his fellows and is liable to be regarded with aversion and subjected to reproach and insult. It assumes that intolerance pervades America and its public schools.

If we accept the theory exploited by those cases we would make the following evaluation of the divisiveness produced by the salute to the flag in the public schools: What can be more embarrassing to a school child, who believes the flag salute is a religious ceremony, than to have the other school children join in the salute to the flag when he refuses to do so, whether or not he stays in the room when the salute is given? In the language of the Louisiana case of *Herald v. Parish Board* <sup>194</sup> and the Illinois case of

<sup>192</sup> Id., pp. 210, 214, 212.

<sup>193</sup> Cases cited in Appellants' Brief, pp. 30, 31.

<sup>194</sup> 68 So. 116, 121.

*Ring v. Board of Education*,<sup>195</sup> it "puts him in a class by himself; it subjects him to a religious stigma; and all because of his religious belief." In the language of the Wisconsin case of *Weiss v. District Board*,<sup>196</sup> he "loses caste with his fellows, and is liable to be regarded with aversion and subjected to reproach and insult."

But the evils prophesied by those three state courts have not been produced by the divisiveness which results from the salute to the flag in the schools, which divides Jehovah's Witnesses from the other children, or from inauguration oaths, which divide atheists from believers, or from the principle of separation of church and state, which divides large segments of sectarian school children from the children in the public schools. The evils prophesied have not resulted from the so-called divisiveness or separateness caused by those things for the reason that the right to be different is protected by the Constitution and is respected by the American people.

The aim of the National Conference of Christians and Jews is to eliminate any semblance of intolerance because of difference in religion. Keynoting its purpose with the words of the Late Chief Justice Hughes that "When we lose the right to be different, we lose the right to be free," it has upheld the right of men to differ in their beliefs, and has stood for something more than tolerance, namely, for a sympathetic understanding by each citizen of religious views different from his own.<sup>197</sup> Nonconformity to our views, or exercise of the right to be different, does not produce in Americans the type of consciousness of religious differences which causes intolerance, but a sympathetic understanding and respect for religious views of others.

<sup>195</sup> 92 N. E. 251, 256.

<sup>196</sup> 44 N. W. 967, 975.

<sup>197</sup> Stokes, Vol. II, pp. 462, 463.

The vast majority of Americans are religious people, but they respect the right of an atheist to disbelieve, and have something more than mere tolerance for his views, namely, a sympathetic understanding of those views, but they do not concede to him the right to eliminate from our public schools everything which is inconsistent with those views.

Having as its basis the belief in God as our Creator, and the resulting corollary that if all men are children of God they must be brothers, the Judaeo-Christian tradition has been the most vital factor in America for promoting cohesion among a heterogenous democratic people. These are the foundations vital to our freedom exemplified in the Declaration of Independence and the Constitution. To that tradition Bible reading and the repeating of the Lord's Prayer in the public schools have contributed much. New Jersey should be permitted, and is permitted by the Constitution, to do everything in its power, consistent with absolute and complete neutrality toward sectarian religion,

### CONCLUSION.

to foster that tradition.

It is respectfully submitted that no principle of constitutional law is violated by the reading of the Old Testament, without comment, and the repeating of the Lord's Prayer in the opening exercises of public schools, and that the judgment of the court below should be affirmed.

Respectfully submitted,

ALBERT McCAY,

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New Jersey, as amicus curiae.